NYSBA SPRING 2013 | VOL. 26 | NO.1

International Law Practicum

A publication of the International Section
of the New York State Bar Association

Practicing the Law of the World from New York

PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent either (i) in laser printed triplicate accompanied by a CD formated in Microsoft Word or WordPerfect to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096; or (ii) by e-mail in Microsoft Word or WordPerfect format to the Editor-in-Chief (amber.wessels-yen@alston.com). Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

Manuscripts are submitted at the sender's risk, and the New York State Bar Association, International Section, assumes no responsibility for the return of material. Material accepted for publication becomes the property of the New York State Bar Association, International Section. No compensation is paid for any manuscript. The *Practicum* reserves the right (for space, budgetary, or other reasons) to move an accepted manuscript from an earlier issue to a later issue. Articles, reports and other materials reflect the views of the authors or committees that prepared them and do not necessarily represent the position of the New York State Bar Association, International Section, or the Editorial Board of the *Practicum*.

Deadlines

Manuscripts intended for publication in the Spring and Autumn issues must be received by the Editor-in-Chief by the preceding 1 December and 1 June, respectively.

Reprints

Each author will receive three complimentary copies of the *Practicum* issue in which the author's material is published. Additional copies may be ordered at cost before an issue goes to press by communicating with Daniel J. McMahon, Esq., at the New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 (telephone (518) 487-5582).

Back Issues and Advertising

Requests for back issues, advertising and subscription information and general correspondence should be sent to the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096.

Back issues (2000 to present) of the *International Law Practicum* are available, in pdf format, online to Section members on the New York State Bar Association's Web site at www.nysba.org/IntlPracticum. A searchable index is also available.

Risk Management in Cross-Border Transactions

[Editor's note: This is an edited transcript of the Continuing Legal Education Program held by the International Section of the New York Bar Association on 23 January 2013, during the Annual Meeting of the NYSBA at the Hilton New York Hotel in New York City.]

MR. ANDREW D. OTIS: Good morning, everyone. Welcome to the International Section's CLE program at the Annual Meeting entitled "Risk Management in Cross-Border Transactions."

I'm Andrew Otis, and I'm the Chair of the International Section. I am going to speak briefly about the International Section. Thomas Pieper will then introduce the program and the panels.

The International Section is a little over two thousand lawyers, several hundred of whom practice outside the United States. The commonality they share is that their practices are across borders. I happen to be an environmental lawyer, and you'll hear a little bit more about that later, but we have lawyers in almost all the specialties: antitrust; litigation; dispute resolution; commercial transactions; and even those related to individuals, such as family law and matrimonial law.

Unique to our organization is our network of sixty-five Chapters around the world. Those represent lawyers in various jurisdictions who may or may not be admitted to practice in New York but have a relationship to New York law and most likely use New York law as an international legal standard. That is another significant aspect of our section: we promote New York law as an international legal standard and educate about New York law as an international standard.

We also are very active in international organizations, such as UNCITRAL, where we are an accredited international nongovernmental organization, and we attempt to influence policy there. We have a number of publications that are excellent sources of reference for international materials.

For those of you who are not members, I would strongly encourage you to join. In addition to the resources that I've described, we have a very active listserv where you can not only learn about issues and information, but it also serves as a network of our entire Section and allows attorneys from around the world to connect to each other.

In addition, we have fantastic meetings, and we have several coming that allow you to exchange ideas with fellow international law practitioners and learn about people and legal developments in other parts of the world.

We will have our seasonal meeting in Hanoi, Vietnam, in October. That's a very well attended regional meeting that will include participants from all over Asia, where we will not only exchange ideas about international law but also will expand our networks into southeast Asia.

That meeting in 2014 will be in Vienna, and we will be reaching out to lawyers in eastern Europe. The person who will be Chair at that time and focusing on the meeting is Thomas Pieper, and he is also coordinating our meeting today. I will now ask him to come to the podium.

MR. THOMAS N. PIEPER: Thank you, Andrew.

You've heard about our great upcoming meetings in Hanoi this year and Vienna next year, but today we focus on risk management in cross-border transactions.

How did it come about? The idea was to marry corporate litigation and regulatory issues into one topic. Keeping with tradition, we divided the event this morning into three panels. The first one will deal with and explain to us what are these risks in a cross-border transaction, how do you allocate this risk and how do you deal with it. That panel will be chaired by Scott Peeler.

MR. SCOTT PEELER: Good morning.

MR. PIEPER: Who you may remember from Panama, when he did a great session on the FCPA.

The second panel will discuss a very new and hot topic. In the past, if there was a dispute in certain transactions you traditionally resorted to the courts, and particularly if lenders or banks were involved. They would say, "Well, see you in court. If you don't pay me, I'll sue you." But in recent months there is new thinking that maybe arbitration would be the preferred method of dispute resolution. And we will talk about this in more detail in the second panel, which is chaired by my partner, Marc Rossell.

The third panel, again keeping with tradition, will be the ethics panel. This panel will be chaired by Gerry Ferguson, so it is the annual Baker Hostetler lecture, along with Marc, who has already been introduced. And Christian Hammerl from Austria will be there as well.

I. Risky Business: How to Identify, Allocate and Deal With Risks in International Transactions

MR. PEELER: Thank you, Thomas.

And good morning. I want to start off this morning by emphasizing, on behalf of all of us, not only our thanks

to you for showing up early for this very engaging panel but also braving the cold to be here today.

Also, to encourage participation, while I think we have set aside time at the end for questions, I know all three of us welcome them throughout. You won't throw us, and in fact, we think it enhances the program immeasurably. If you're hearing something and would like to know more, shoot up a hand and we will definitely entertain those questions live as we go along. So please, don't be bashful, okay?

I have the great pleasure of moderating today's panel, and I would like to start by introducing the gentleman to my immediate left, and I'm sure many of you know David.

David Burt is corporate counsel to the du Pont Company. Since joining du Pont in 1995 David has been a member and head of the company's internationally renowned trial team. Since the late 90s his practice has centered on commercial litigation, with a special emphasis on international arbitration and other forms of dispute resolution. To say he is an expert on these matters is a gross understatement.

David is also on the Executive Committee of CPR, a global organization for lawyers seeking gold standard ADR protocols and procedures, recent case decisions and practice guidelines. I know you'll be talking about that during the course of your presentation.

DAVID BURT: I will get my plug in on the CPR.

MR. PEELER: There you go. Fair enough.

Anyone who knows David also knows he finds immeasurable and meaningful ways to participate in his local community as well. I'm sure you'll agree, we are very lucky to have him, and I hope you'll help me welcome him to our panel.

It is also a great pleasure to introduce a man who requires no introduction to you, your Section Chair and partner in Curtis, Mallet-Prevost, Colt & Mosle, a distinguished environmental group, Andrew Otis. Prior to joining that firm he served at the EPA, where he played a key advisor role in policy areas such as global climate change—a topic I'm sure is on none of our minds this morning—use of market mechanisms, and economic analysis methodology.

Today Andrew represents a wide variety of clients in matters involving environmental laws, regulations and policies as they relate to transactions, litigation and enforcement actions. As I'm sure you're all aware, Andrew is an incredible resource and attorney.

Now this is the awkward part, where I introduce myself, so forgive me.

I served as an Assistant District Attorney in the Manhattan District Attorney's Office before beginning a federal white-collar practice in 2000. I served as a partner in two law firms, Arent Fox and Chadbourne & Parke, where I met certain people whom you may know at this table. My practice became focused almost exclusively on anti-corruption law and compliance about eight years ago, and it has been my pleasure to represent and advise some of the largest and most profitable companies in the world in these difficult areas.

Approximately six months ago—and this is the part where my story takes a turn that I never foresaw—for about six months I had been developing software and some mobile applications. I thought it would be interesting to learn how to do that. Flying all around the world I had time in airports and hotels, and I began to teach myself how to code software and apps for the iPhone and trying to marry my compliance and anti-corruption experience with that sort of desire.

About six months ago a company called Stroz Friedberg acquired the intellectual property to the software mobile applications that I had invented and asked me to come in-house and build out a compliance division for them. I am proud to say for the last six months I have been helping to bring all those ideas into fruition. My app actually exists on this device, and it is going to be rolled out in the next few weeks. So my career has taken a completely different turn, but you can see me smiling. It is a great one.

It is a pleasure to be with you this morning. Again, forgive the awkwardness of that self-introduction and plug.

Today's format is one that we hope will find the right balance. It is always tricky with these panel discussions, but here is what we decided to do.

Today's agenda: we are going to start out with each of us coming to this from a different topic area. We are going to summarize what we think are the highlights, in summary fashion in ten minutes or less. We will start with David dealing with his area of expertise, alternative dispute resolution and how that translates into the international arena. Next we will turn to Andrew, looking at addressing and allocating risks in the international arena from the environmental perspective, and we will follow up with me on the anti-corruption landscape.

So after those ten minutes each, roughly, we will open it up to a panel discussion where I have prepared questions. But again, we welcome you not only to ask during our ten minutes but afterwards as well. Your questions are always better than those I can prepare.

With that I would like to start off by turning to my friend to my left, David, to kick off.

MR. BURT: Okay. Good morning, and thanks for coming.

Scott, apparently you are now a fugitive from the law. In your current job it seems you've escaped big law and are now—which is a little weird for an anti-corruption guy—on the lam.

There are many more than ten minutes of highlights about how to think about alternative dispute resolution in the context of transnational transactions and practice. So let me sort of start at the top with a few basic things, and then I'll just run out of time.

How many transactional lawyers do we have in the room, people who do deals?

(Show of hands).

That is a good representation. How many people are involved in with litigation and dispute resolution?

(Show of hands.)

Okay, about half and half. The second group is going to love what I'm about to say. That is, that one thing that we have found is that it is possible with a concerted educational effort inside of our company to begin to elevate the dispute resolution provisions of a contract to almost the same level as the basic value proposition that's being negotiated and to do it early in the process.

The main pitfall that I have faced inside a big multinational is, as we call it, to "clean up after the elephants," after something big in a transnational transaction goes wrong. I know everybody is aware of this: it is 11:59 p.m. the night before closing and somebody pulls an ADR clause off the shelf and plugs it into the contract, and it contains—or more often does not contain—things that you would prefer to see, or not to see in the case of things that do appear. My favorite example in the last couple of years was when I had a contract that called for arbitration under the "rules of the American Chamber of Commerce": There being no such organization that has arbitration rules, we actually were able to come to agreement with the other side on the reasoning that what must have been intended was the closest acronym, which was the AAA—, which wasn't quite right, because that's not international. So we settled on the ICDR. But you shouldn't have to go through that stuff.

So I would emphasize that the dispute resolution lawyers should talk to the transaction lawyers and begin to offer your services. After all, the transactional lawyers are not to be faulted for not thinking of this stuff early on: They probably haven't suffered as much as we have from this sort of lack of planning; it just isn't traditional. But at du Pont what we have recognized is that a very significant risk of the transaction is that our company now has almost half of its revenues from abroad, and of those revenues almost half are from what is loosely called the "developing world," where the default venues can be quite unattractive. No offense to anybody, but I'm describing almost all of Latin America, where, frankly, if one is to generalize—and you have to generalize for these things sometimes—although there are excellent courts in many places, they tend to be very central, and you don't know if you're going to wind up in a remote court in some country. One way to look at it is that Miami is the capital of South America, and it might be just as well to prescribe arbitration in Miami under a widely acceptable rule set—which according to Latin American legal culture often is the ICC. Now you might not think about that, because the ICC is based in Paris, and I think they have a Hong Kong office as well. But knowing these things in advance, or getting into a discussion with your trading partner in advance about these matters of selecting the venue, the law that's going to be applicable, the rule set and the seat of the arbitration and the method of selection of arbitrators can save a world of hurt later on.

While I'm on it, I don't like to use the word litigator. It kind of implies things. I tell our outside counsel I don't hire litigators; I hire trial lawyers. What that means is that if it's not going to make a lot difference at trial, you don't do it. But I prefer to refer to dispute resolution professionals.

So for you dispute resolution people, one thing to know is that, if you're going to prescribe arbitration in a cross-border transaction, it is good to start with the model clause from whatever arbitral institution you might be choosing in the case of institutionally administered arbitration. But from our perspective all of those clauses are deficient, and they are deficient either because they omit one of the seven key elements that in our view have to be present in order for a clause to make for an enforceable arbitration agreement, or they lack key things that we almost always want, like severability, confidentiality and several other things that really ought to be thought about. If you think about the possibility of the confidentiality of your trading arrangement being blown and the potential disruptive effect on upstream and downstream commercial arrangements, you'll be glad you put that in there. But that's just one example.

I am going to bang through those seven elements of arbitration in just a moment, but finally, just a piece of advice that comes from dealing with in-house corporate clients for a while now: I find you can never be too basic in the explanation that you give them of things that seem perfectly obvious to you. Maybe I'm giving you basic information and it seems perfectly obvious to you, but I'll just give you an example.

When I first joined du Pont, very quickly I got this big case. I guess it was given to the new guy. I'd been in private practice, and so I went out to meet with the head of the nylon operation worldwide, which was a big deal at that time. So I got up to the white board and did what

I had always done with my clients in private practice, much smaller scale. I said here is how liability gets created. There is a duty, somebody violates the duty, and it causes damages that are quantifiable and that equals liability. Put the plus signs in there, four elements add up to liability. And this very senior person in the company said, "Nobody ever explained that to me before." So I am encouraging you, don't worry about looking un-cool if you have to explain, for example, the difference between mediation and arbitration to your clients.

How many have heard the question: But will this be a binding mediation? No, mediation is not binding; it is a voluntary process. To avoid them embarrassing themselves, it really is a good idea to take ten minutes at the outset talking about ADR either during the negotiation or, hopefully not, during the execution of what the basics are. As for the basics of an arbitration clause, here are the seven things.

First, this may seem strange, but define what is arbitrable. If you think about that, what's the standard language you see: disputes arising from the contract or some variant like that. Possibly that is not nearly broad enough, because what can happen is that the other party doesn't want to be in arbitration, but rather wants to be in his home courts. So he cooks up a cause of action for tort or something like that out of the same context and drags you into a court. It is just as well to use a broader description of what is arbitrable, and there is plenty of good language out there on the Internet to do that.

Second and even more obviously, the clause needs to commit the parties to arbitration. That actually is left out sometimes. You can choose the administering authority and its rules, that's fairly obvious. Unless you're going to provide for ad hoc arbitration, and ordinarily we won't do that. Where we have a good relationship with an established trading partner and we anticipate there may be a bump in the road we need to get over together, that's when we will use it.

Third, provide for entry of judgment in some place where your opposing party has assets, but just saying in any court having jurisdiction works just fine. And by the way, the point to make with your client, backing up just a second, as for arbitration, when it comes to executing on an award the client is in much better condition with an arbitral award enforced under the New York Convention than it would be with a court award from anywhere in the world, especially the United States. Because usually there are not any treaties that provide for the enforcement of the U.S. judgment anywhere else, and principles of comity don't get you very far. Whereas the New York Convention, which is subscribed to by forty-seven countries, provides for that explicitly.

Fourth, choose the language of the proceeding.

Fifth, choose the seat. Explain to your client that even though arbitration might be seated in one place, it can be tried in another. The significance of the seat being that that's where the procedural law for the arbitration comes from.

And then finally, specify the number of arbitrators and their method of selection.

This is not nearly enough time. Now what have I not said?

MR. PEELER: Again, the idea with this format is just to sort of begin to give you this morning some of the key highlights from our different perspectives, and then we will follow it up with your questions and some that I've prepared to dig deeper. For example, I have tons of questions based on what you said a moment ago.

MR. BURT: Which wasn't much.

I guess I would add that the world over, as many of you obviously know already, attitudes toward arbitration are more uniform than attitudes toward other alternative methods like mediation. Mediation is in its early maturity in this country, but it is well accepted in the UK. It is absolutely amazing what a patchwork Europe seems to be when it comes to the acceptance and awareness of mandate. You have places in the Balkans where there is an eager appreciation and a desire to learn about it. But Germany, no offense, Thomas, seems to me still has some distance to come from what I hear: I'm not speaking from firsthand experience, but it seems like there is a preference to bypass mediation.

There is curiosity and some limited application in Asia.

Arbitration is somewhat variable also, and it is well to be aware of the different cultures. The reason I talk about mediation so much is because as Mike McIlrath at GE says, "Arbitration tends to be where I live, but mediation is where I would rather live; it is a much better neighborhood for the resolution of business disputes."

If you think about how a contract is formed, it is bringing the following dynamic: "I have something that's more valuable to you than it is to me and vice versa, and we put them together and create value and we agree on how we are going to do that."

That's business-like, okay? What could be less business-like than filing a piece of paper someplace accusing you of all kinds of horrible acts, fraud, various other torts, breach of contract, stealing from me, and then sending you all kinds of insulting questions and wanting to take depositions of twenty people? That is completely un-business-like.

If you look at mediation—which is in essence a collaborative effort to resolve a dispute—it is much more like

business and it takes advantage of your client's talents, and they feel much more comfortable in that zone, I find, if well prepared.

So final pitch, and here is the CPR pitch: one thing I do is to chair the Mediation Committee at CPR, which has an international focus. Du Pont spent a year creating what is about a forty-thousand-word internal book called the du Pont Global ADR Guide. This now is in the hands of our two hundred lawyers globally, describing our approach to ADR. This book is being transformed as we speak into a deskbook for busy in-house practitioners doing transactional work, and it will be available through CPR as a member benefit probably later this year. So it appears to be the only thing of its kind in as short a format. You all probably have inch-and-a-half-thick books three feet long on your shelf talking about this subject. This tries to do a competent job in about forty thousand words.

MR. PEELER: Well done. Okay, well thank you, David.

Andy, could we impose upon you now for some viewpoints and summaries on the environmental front.

MR. OTIS: You can. What I want to talk about a little bit is to build on something that was said earlier. Scott talked about elevating the dispute resolution clause in the agreement to something that's dealt with prior to closing, and even prior so that, as part of the value transaction. And I am going to deliver the same message: I would like to try to elevate environmental issues into part of the value transaction. That's something I try to do with my clients on a regular basis.

First, I'm going to talk a little bit about what are the environmental liabilities that we are talking about here. I'm going to break them down into two categories. First is contaminated assets. Many of you have heard or read in the media about various contaminated assets from various situations, ranging from Love Canal in the United States to other contaminated assets around the world. My presentation focuses on the laws in the U.S. that create that environmental liability, but they are not restricted to the United States. I just happen to use that as an example. There may be a perception, "Well, we are doing business in Latin America, and they don't have laws, and even if they did have laws nobody enforces them." Or, "Look, it is China, they just put a pipe out in back and it all goes away." Or even in Europe there may be a perception, "Well, these Europeans, they are not so much into actual legal liability. They will negotiate with you to come up with an agreed set of rules that you'll have to follow over a long period of time." And while some of that is true, there are specific rules all throughout the world regarding environmental compliance.

The issue outside the United States, and even in Europe, is not just the legal structure but enforcement. So you may find significant variations in enforcement of environmental obligations in China, say between WOFOs, wholly owned foreign organizations, and Chinese entities. So the key to dealing with that is determining what the potential liability might be in preparation for potentially taking that on. If you're an investor coming into China and you are buying what was a Chinese entity, don't expect that your new entity will be treated the same by the Chinese government as it was prior to your purchase.

The liabilities. I will tell one of my favorite stories. I love to tell it. As most environmental attorneys in transactional practices, I often get contracts sent to me by the corporate partner saying, "Look, the client has assured me that there are no environmental issues here. Just take a look at the representations and warranties, mark it up and get back to me. It really shouldn't take any time at all." I love to hear that. I say, "Great, excellent. I'll go home early. Fantastic."

So one of my favorite corporate partners said that to me. We were selling in this particular instance. He calls me up and he says the buyers would like to do a Phase II—that is, an investigation of soil and groundwater contamination—and can we stop them? I said, "Well, are they going to buy the company if you tell them no?" He said no, probably not so. I said, "Well, you probably can't stop them."

So they went ahead and performed an investigation. I said, "Look, you told me your client said there are no problems, so what could be the issue?" Knowing that there might be an issue, they went ahead and performed the investigation and found not only that there was an issue, but the site itself had years of contamination. The contamination had spread off-site. It contaminated a stream. It had gone on to contaminate wells that fed a dog pound, and so there was concern about whether they were going to be sued by the dog pound owners because of the contaminated dog wells. Two and a half million dollars of remediation later and a two-year delay in the transaction, and they finally sold the business. That is the smaller part.

The larger part of cost related to environmental issues can be compliance. It is not uncommon for entities that are looking to sell business units that are performing poorly to reduce investment in those units over time. Reduced investment can lead to a failure to upgrade units to comply with rules. The rules are not always as clear as one might think. They can be not only the result of litigation and disputes or disagreements with regulators, but they can also be subject to reasonable differences in opinion as to what's required to comply with the rule. So those are the potential liabilities.

How do we deal with them? Due diligence is the answer. What steps to due diligence do you take? You may

have all heard about a Phase I environmental investigation. I cannot emphasize it enough. It is an important investigation usually performed by an environmental professional. To the extent that there is significant potential noncompliance, lawyers, like me, are often involved in such investigations. The style of investigation can vary from region to region. In North America and South America investigations tend to look pretty similar. In Europe it can vary a little bit, having a little more surface and soil investigation. But usually it is an investigation that involves visiting the plant, interviewing people, looking at the assets and trying to review documents. It is really an attempt to determine if there are indicia of major issues.

It is also a fantastic initial view of how a company is run. A company that manages its environmental compliance well tends to be generally well run. A company that manages its environmental compliance poorly tends to be a company whose overall management should be further investigated.

The environmental due diligence investigation can take two or three weeks and several thousand dollars, but it is a good indicator of what happens, or what the issues are. The key point of environmental issues in transactions is determining how those issues fit into the value proposition, including uncertainty related to potential liability. So the variation on liability uncertainty can affect value, and there is what I call an "uncertainty premium": To the extent that greater uncertainty exists, then buyers are much less willing to take on risk.

Determining environmental issues in a transaction can be a matter of reducing uncertainty rather than actually dealing with a problem. So if a problem can be fully characterized and fairly certainly denominated out, it can be incorporated into the price structure of the transaction. And the other variable is risk tolerance. Risk tolerance varies greatly amongst buyers and sellers. So strategic buyers—entities that are in the business—that are used to dealing with environmental issues in a business may be willing to take on environmental issues that, for example, financial buyers may not. Hedge funds, as you can imagine, or private equity companies more specifically, have zero interest in retaining liability. As one private equity company said to me, "How am I going to pay for indemnification? Am I going to write a check? I don't really have money. I'm moving money around from transaction to transaction, and oftentimes transactions are subscribed in certain ways." So the ability of a financial buyer to retain liability after a transaction can be significantly different than a strategic buyer.

So what mechanisms do we use? We talked about the alternative dispute resolution mechanism. There are several mechanisms. My favorite and the clearest one I think is a clear allocation of liability in the agreement, and then some way to try to have the purchase price reflect that. I try to minimize the amount of post-closing interaction that there has to be. In large transactions involving large companies, often large public companies that have significant environmental liabilities, that's impossible. And that can lead to post-closing mechanisms for allocating liability that can result in dispute resolution, mediation, arbitration, even litigation. They can result in kind of bespoke mechanisms for trying to get subject matter experts together to come to some sort of resolution the parties agree to. If that sounds vague, it is. I see those clauses every once in a while, and every time I see one I say, "What do you really expect to get out of this?" And the answer is always to deal with this issue later, to get through the deal, to close and then deal.

I've been through those situations where it has worked out fairly well, where the companies have been able to get together post-closing and decide, okay, here is how we are going to split things up and over the next five years we will do these things. I've been in situations where those procedures have ended in civil litigation in the Southern District of New York. With that I will close my opening remarks.

MR. PEELER: Thank you.

Well, the anti-corruption front. Before I begin my short summary of where we stand in 2013 I should also bid you a very warm welcome again and good morning. And hello from a friend of many of you and one of your former Chairs: I had the privilege of having lunch with Isabella Franco recently. And of course she wishes you all a very warm hello from Sao Paolo, literally a warm hello from Sao Paolo.

I wanted to ask you some questions that I think sort of highlight some of the main points that I want to drive home to you in a summary fashion. So please feel free again to yell out some answers if you think you have it.

We all know the dangers of the FCPA. Just ask Wal-Mart; they are our current bogie. And I predict that, if not later this year, early next year, we will see a massive settlement suddenly. They will be in the Siemens territory. We have all been reading about those things and tomorrow we will read about somebody else.

But I want to highlight something for you. If we looked at the top ten largest settlements of companies that violated the Foreign Corrupt Practices Act and settled with our government—we look at the top ten largest financially overall settlements—how many of them do you think were against companies that are not based in the United States? Meaning they are international, they are based outside, non-domestics, how many do you think?

AUDIENCE MEMBER: Eight.

MR. PEELER: I hear eight.

AUDIENCE MEMBER: Ten.

MR. PEELER: I hear a hundred percent of the top ten are all international companies.

We've got 80 percent.

MR. OTIS: Zero.

MR. PEELER: I have zero. We now have a wide spectrum. The answer is, are you ready? Nine. Currently the number is nine. It does fluctuate between eight and nine, depending upon when you ask the question, who suddenly breaks in or falls out. But the truth is ninety percent. Even if it is eight percent, that is a staggering statistic, and one that many of our international friends and companies and clients who are internationally based resent: here is a U.S. law being enforced extraterritorially, aggressively, and in the biggest ways in a vast majority of the cases against non-U.S. based companies. Kind of an amazing fact that I would like to start off this morning with.

Two other statistics I often throw out. What is the longest term of imprisonment that has been handed down to an individual for an FCPA violation? What do you think? A person who didn't actively perhaps participate in the bribe but looked the other way and allowed it to continue. How long do you think the longest sentence that has been handed down is?

AUDIENCE MEMBER: Ten.

MR. PEELER: I hear ten.

AUDIENCE MEMBER: Five.

MR. PEELER: I hear five. I hear two.

AUDIENCE MEMBER: Three.

MR. PEELER: Three. Four. Six. You're all too low. It's fifteen. Fifteen.

Now the interesting thing is you all would have been right, meaning if I'd asked that question a year ago or even eighteen months ago, the numbers you just said in escalating fashion would have been correct at different times. It is going like this (indicating upwards) and I think we will continue to see it rise.

Federal judges are taking their cues from some of the enforcement agencies, the DOJ, the SEC. And whereas perhaps yesterday it was treated like a low-end white-collar issue, where probation or low amounts of incarceration were the answer, today it is being treated much more seriously, much more broadly.

A third statistic I like to toss out, if we added up how much in fines and penalties our government, the United States Government, has collected in just the last three years alone by enforcing this one law, what do you think? How much money do we collect in a three-year period by enforcing one law: Anti-corruption?

AUDIENCE MEMBER: Five billion.

MR. PEELER: I heard five billion.

AUDIENCE MEMBER: Four.

MR. PEELER: It is between those numbers. Depends on how you're adding it up and between what point, but generally you are in the right ballpark, between four to five billion dollars. Besides the laws of the IRS and taxation laws and perhaps the civil False Claims Act, this is way up there. So people want to know whether it is going to continue. The answer is yes, it will, and the enforcement trend will continue to be that aggressive.

I want to end my remarks by talking very briefly about a story. How many of you have heard—it was a big story about a year to eighteen months ago and well publicized—about IKEA in Russia? Are you familiar with this story? If not, let me briefly summarize it like this. I was actually sitting in Hong Kong when I first heard about it, and it is a story that I can't quite forget, but it illustrates some of the challenges that we were talking about in international transactions and anti-corruption. It screams to be told.

We all come at things with a cultural bias. We try hard not to, especially people in this room I am sure. We try very hard to be aware of that and to overcome it. But it is a constant struggle, and we should be reminded about it every day. The IKEA story went like this. IKEA recognized after the fall of the Soviet Union that this was going to become an extraordinary market of people looking for new, lower-cost furniture. In fact, IKEA still today is one of the largest retailers in Russia. So they planned to quickly build up an infrastructure and be able to sell their products in Russia, St. Petersburg, Moscow, et cetera. They recognized that corruption was an issue. They went in with eyes wide open. They were a good client, and they recognized this was going to be a problem. So they turned to trusted people; they put the right language in their contracts. One of the first things that came up was that someone said, "Look, to turn the power on in your largest store in St. Petersburg, you're going to have to pay a bribe to the people who run the power authority." IKEA said, "No, we won't do that. In fact, we will spend money to build our own generator or to rent generators to get power through a completely appropriate way rather than pay the bribe." They became very public about doing it.

Now, they hired third parties that they believed were trustworthy to help them implement this non-corrupt strategy in Russia. Unfortunately, what they found out was that the third party was in fact paying bribes to get the generators, claiming that there was no other way to do it.

So IKEA, again being a responsible corporate citizen, turned around and sued, brought that third-party's behavior, illegal behavior, to both the criminal authorities

and the civil courts looking for remedies in Russia, where they quickly found out that the criminal authorities had no interest in pursuing the third party. And the third party filed a cross-complaint in the Russian courts against IKEA, and those courts found against IKEA. They ended up getting a judgment against them for several million dollars by the third party in damages. And IKEA publicized this, throwing their hands up in the air a few years ago, saying, "What do we do? We are trying to do it right." My point isn't that in ten minutes we can't find an answer to that particular question. That's a complex one, but it is a really good one to illustrate again that you can't go in with your blinders on, and that the issues in one country, Russia, can be similar or completely different than an issue in another county, and these challenges are profound. We will talk during the presentation about the significance of the same ones Andy talked about a moment ago.

Here is the message I leave you with this morning. Doing due diligence on third parties with whom you are working is extraordinarily important, and put compliance measures in place to try to mitigate the risk that your people are making mistakes or are not looking closely enough at the activities of third parties.

Okay, now putting my moderator hat back on and sitting back down.

Both of your remarks were very interesting. David, I wanted to ask a question. You referenced the seven essential elements, the "big seven," so to speak. I was wondering in your experience if you could highlight one or two of them that you found to be either the most misunderstood and/or the most valuable, especially in the international arena?

MR. BURT: Well, I would really emphasize that, when you do use the ADR clause, it sounds like such a prosaic topic, but it has such an enormous impact later. The last clause I guess negotiated is the first one to go looking for when there is a problem. I would emphasize a couple of things about that. One is the scope. Typically one sees any dispute, controversy or claim arising out of or relating to the contract, but I would also roll in tort, statute, any other legal or equitable theory arising out of the contract or the relationship created thereby. That way you potentially roll in various other causes of action and prevent venue fight.

Let's see, the other aspect is of course the choice of law and of the seat of the arbitration.

MR. PEELER: Do you normally look for New York?

MR. BURT: Well, New York is generally acceptable to foreign parties in many instances. If not, you can specify the law of England and Wales. For example, if you have a contract with India, that's going to be an acceptable choice most of the time. You look at where is the opposite party? Where do they have assets? What are they accustomed to culturally? Using the India example, it would be entirely reasonable to specify the law of England and Wales and a seat in Singapore, and under the auspices of the Singapore International Arbitration Center. That gets you ninety percent of where you need to go in that clause. The rest should be easy.

MR. PEELER: I'm curious, how often out of a hundred, how often would an international transaction in New York be accepted versus being pushed back on? You said widely it is acceptable.

MR. BURT: That's hard to answer. My impression is we don't have much trouble applying New York law.

MR. PEELER: How about you out there, do you find that to be the case? Have you experienced cases where New York has been pushed back hard on an international deal, and you had to find a solution?

(No response.)

The audience sits stunned and amazed.

MR. OTIS: Let me ask you, do you find regional differences in acceptable law? Like is it more likely New York would be accepted in a Latin American transaction where India would amongst England and Wales--

MR. BURT: Right, probably New York law would be more acceptable in a Latin American transaction. There is a big divide in the world between the civil law countries and the common law countries. I actually had a case in Singapore that was against the French under Chinese law.

The differences in substantive law the world over tend not to be enormous. When I first got the Chinese law case I thought, "Oh, gosh!" I was first chair on that case, and I thought, "How in the world do you try a case under Chinese law?" Well, guess what? All the basic stuff applies. In fact, it is somewhat simpler because it is statutory. So one thing to be aware of is civil versus common law transaction.

Yes, sir.

AUDIENCE MEMBER: I think it also depends on the nature of the transaction. If it is a banking transaction, and you want participation, English-language documents, New York law is probably the preference.

MR. BURT: Good point. Excellent. That's right.

MR. PEELER: Thank you for that as well.

Andrew, I know that you only began to scratch the surface during your remarks. I was wondering if I asked my first question to you, as we start this year, as you look at the landscape out there in the international arena and from the environmental perspective, where do you think the greatest risks or dangers are? I was highlighting third parties, and the significance of due diligence on

the anti-corruption front. You also talked about those, but if you're looking ahead, where are the biggest danger points on the environmental front right now?

MR. OTIS: There are a couple of areas shifting. The biggest danger points in the environmental area tend to come from changes in environmental regulatory structures. And there are two changes that have been going on for some time and look like they are going to continue and in some cases accelerate in this coming year.

One change is in Europe, a move more towards a liability scheme that looks a little more like the United States environmental liability scheme, where you may be held liable regardless of fault for past acts. That I think is going to be a change in the liability scheme in Europe that is going to affect both transactions and compliance there.

The other thing is what might be considered to some subterranean. There is a popular perception that, in regard to greenhouse gas or climate change, there is no change in the regulation or legislation in the United States, and that, while other parts of the world are moving on, the United States is not. Actually, that's not true. The Environmental Protection Agency is using its authority under the Clean Air Act to develop a climate change program that is going to look completely different from the climate change program in the rest of the world, and it is going to be very hard to match those two up. The U.S. program is going to be technology-based. It is going to be based on industry categories. It is going to start with the entities—it has already started with the entities—most easily regulated in the United States, which are electric utilities and oil refineries. It's going to move from there to production facilities. And it will be case by case in the sense that, as entities that emit fairly low amounts of greenhouse gases get new air permits, they are going to try to figure out somehow what the best available control technology is and with a pollutant that is not susceptible to add-on controls, like every other air pollutant is.

So that is going to be this developing regulatory regime that is going to start getting people caught up in dealing with greenhouse gas regulation in the U.S., and it is going to accelerate in the second Obama term.

MR. PEELER: Interesting. You mentioned President Obama. I have two follow-ups I wanted to ask you. I'm sure you noticed, like many of us, the significance of the environment that the President put into his State of the Union speech. I'm wondering if I can impose upon you to sort of imagine for us what you think the government will be doing?

MR. OTIS: That's actually interesting, because certainly President Obama laid out his priorities. He described climate change and the environment as one of them, but that's all done in the context of a totally gridlocked and dysfunctional Congress. So the ideal structure would be the creation of a new climate change program that had some trading component that was linked to trading components and international agreements and other trading components in Europe and Japan. A system that facilitated the worldwide flow of carbon and money that went to areas—basically just really simple economics where money went to control carbon at the lowest marginal cost. That's not going to happen.

What will happen is that the EPA will continue to use its existing authority under the Clean Air Act to create a regulatory program that will look different from regulation in the rest of the world and simply will not facilitate that flow of capital to least marginally controlled sources over time.

Now what exactly is that going to look like? I can describe it technically. Anybody that emits more than twenty-five thousand tons of carbon per year and wants to get a new air pollution permit (which is a lot of entities) is going to have to go through a case-by-case analysis of the best control for that particular source. That's going to be kind of a mystery. I've seen it happen in the mining industry a little bit. It looks like energy efficiency. In a lot of places it looks like energy efficiency.

Does that mean that our fairly notoriously inefficient industry starts really clamping down on energy inefficiency? It's possible. But nobody really knows quite yet what it is.

MR. PEELER: It will be exciting to see how it plays out.

MR. OTIS: It will be.

MR. PEELER: From your first response I noted you were talking about the changes in European liability.

MR. OTIS: Correct.

MR. PEELER: It sounds a little bit in your description—and I was going to play with this a little bit—it is that close to strict liability.

MR. OTIS: It is close to strict liability. It is similar to the Comprehensive Environmental Response Compensation and Liability Act. It is strict liability. It is joint and several with a contribution scheme.

I have to be honest, I am less of an expert on that particular scheme, but it looks similar to what we have in the U.S.

MR. PEELER: Well, it is interesting, and I'll throw this in from the anti-corruption perspective. I'm sure many of you are aware that in 2010 the United Kingdom announced what was widely expected to be—and turned out to be exactly what we got—the U.K. Bribery Act. What was interesting and caught the attention of all of us and most of our clients is that there was strict liabil-

ity—or close to it—built in for companies that failed; that is, where bribery occurred either by their own people or by third parties and they would not be able to show that they took meaningful and adequate steps to prevent that bribery from occurring. And if they couldn't show that, strict liability would ensue, which could be catastrophic and enormous and of course shifts the burdens enormously to the companies.

It seems that, from the European perspective, here in two different arenas, we are seeing an approach much more comfortable perhaps with assessing strict liability.

MR. OTIS: That's right. And I think that they may be motivated by the same general policy principle, which is that, with regard to contaminated sites, they need to be cleaned up. Perhaps somebody that is associated with the site that has resources. So if you're associated with the site and have resources, the authorities are going to look to you to do it.

From what you've described the underlying principle is we need to prevent corruption. We are going to create this liability scheme that has such consequences that it will induce you to perform the diligence necessary to prevent corruption going forward.

MR. PEELER: Exactly.

OLIVER ARMAS: David, quick question. Given your views with respect to mediation, how often do you recommend to have step-up clauses in your ADR clauses?

MR. BURT: Most of the time.

MR. PEELER: Would you mind explaining step-up clauses?

MR. BURT: Sure; right.

The step clause is sort of the first part of a dispute resolution clause where you provide not only for either final dispute resolution in the courts or alternatively arbitration. Rather perhaps you build in the requirement that the parties go through a mediation process prior to entering formal dispute resolution, and possibly prior to that you provide that they go through some sort of a negotiation process.

And by the way, I'm not an enormous fan of step clauses. But I do think they work. I think most of the time they should be included, but it's not dogma. It needs to be situationally appropriate, and you have to avoid stepping in a couple of significant cow patties on your way to dispute resolution, and here is what I think they are.

First of all, it may not always be appropriate, given the identity of the parties. If you have a problem of a very large trading partner and a very small trading partner, then the idea of escalating to less interested, more authorized senior managers may make no sense at all. There may be nobody on the other side who is capable of being escalated to, and that may just be a waste of time. On the other hand, if you do have similar executive rankings or manager rankings in your organizations, it may make a great deal of sense. Because when you go to somebody who has a clean desk and maybe isn't as emotionally involved and has thirty days to gather the facts and make some kind of agreement with the other side, that can be very, very efficient. So that's a situational hazard.

I think another very important hazard in step clauses—if you're going to provide for executive negotiation or executive escalation and/or mediation—is to be sure that you put in a time limiter for both of them or whichever you choose. The reason is that if you don't, what can happen is that the opposing party, who perhaps wishes to delay the resolution proceeding, will contend as long as possible—which can be a very long time indeed—that you have not complied with the requirement fully. So what you would say is that in the case of a mediation clause, in the event of a dispute written notice shall be served of the dispute and its particulars, and the parties shall proceed to mediation. If mediation fails to resolve the dispute within sixty days after the notice of dispute, then either party may initiate formal resolution response. So put a time limiter in there. Because otherwise the arbitral panel, for example, can say, "We don't have jurisdiction." That's a terrible outcome.

MR. PEELER: Limbo.

MR. BURT: That could lead to litigation, and may not be what you want.

MR. PEELER: Jim.

JAMES DUFFY: I just wanted to go back to something Andrew said in his presentation (which I agree with completely), if you find shoddy EPA compliance, most likely if you go up the scale you're going to find shoddy management in general. But I think it's really the other way are around. If management is too casual you're going to find it in EPA and all sorts of regulatory fields. So I guess the conclusion I would draw from that is if your view of management is that they are entirely too casual, you probably have to look at EPA and almost every other area as well.

MR. OTIS: I wouldn't disagree with that at all. My characterization was simply, (a) the way I come to it because that's the way I get there, and, (b) just as an indication you need to investigate further. You're right, I agree. That's been my experience too.

MR. DUFFY: It isn't isolated.

MR. OTIS: No, not at all.

MR. BURT: As an indication of overall health I think it is probably a great diagnostic.

MR. OTIS: It can be very effective, and not just a diagnostic but an excellent early warning.

MR. PEELER: Yes, could I have your name.

CAROLINE RIDER: Caroline Rider.

MR. PEELER: Caroline, good morning.

MS. RIDER: Good morning. If you're dealing with small to medium-sized enterprises who are trying to do business internationally—in fact I had a client do this—they will sometimes form a non-equity alliance with another smallish or maybe medium-sized company in another country. They are trying to get something done, maybe they are trying to market something, distribute something, whatever. How much FCPA responsibility does that small U.S. company have for what the alliance partner is doing? There may or may not be a formal contract between the parties; there certainly isn't any control, but you're talking about strict liability.

MR. PEELER: Well, under the U.K. Bribery Act, despite what rumors may have you believe or that it sounds like the U.S. is enforcing the FCPA rabidly—I use the word rabidly intentionally—I think that's exactly where we are. The U.K. has a stricter law than the FCPA, namely, the U.K. Bribery Act, but it has only been in place a short time, and the enforcement is only beginning to occur, so we don't have that level. I think it could occur. That's what a strict liability piece is.

Can I just ask you with the alliance piece, what's the relationship that the small to medium size company in the U.S. is forming internationally?

MS. RIDER: Yes, with another medium-sized company.

MR. PEELER: Joint venture?

MS. RIDER: Well, see, that's the thing, a non-equity strategic alliance. So they have an ongoing project, but there is no equity investment of one side or the other, and there are no financial hostages. There may or may not be a specific written contract, but they are working together over time.

MR. PEELER: Are they reaping some benefit from their combined efforts?

MS. RIDER: Yes, they are.

MR. PEELER: Let me point to this, if I may, in terms of highlighting why I ask that question. You can look at percentage of ownership. You could also look at, when talking about jurisdiction, whether or not the parties are enjoying a benefit of ill-gotten gains. So a bribe is being paid by the international partner—let's say even without the knowledge of the U.S. side of the equation—but that bribe assists in the sense of that joint benefit that both sides are getting. Chances are when a bribe is paid that is a fact. Most people don't pay bribes just because; it is to drive the business forward.

The U.S. has taken an extremely aggressive position, and I'm happy to explain the jurisdictional way that arm can reach as far as it can. But over the U.S. party, if I were representing that U.S. company, I would suggest that they should take a very strong hand in making sure that that international partner knew what would not work, what they would not accept in terms of behavior. If there is no written agreement, there may not be an ability to put that language into an agreement. But I would certainly have documents and as much as I could to point to how strong a position I took in what would not be allowed. A failure to do so could and might lead to liability on the U.S. side.

MS. RIDER: Thank you.

MR. PEELER: I will offer this too. A lot of times people say to me, "But wait, under the law we could win." I tell people, "Well, maybe you could, and we could spend millions of dollars proving that point, but after we've spent the millions of dollars in actual fees and lost productivity on your part, have we really won?" Isn't it better to avoid the problem to begin with? When we are talking about this rabid level of enforcement, it is a good thing to be wary of.

Thanks for the question.

Good morning. Your name, please.

FRANCISCO HERNANDEZ: My name is Francisco Hernandez.

MR. PEELER: Good morning.

MR. HERNANDEZ: Good morning. I will add to that answer.

MR. PEELER: Please.

MR. HERNANDEZ: The same level of scrutiny that you will receive for doing business with a third party will be applicable to this case.

MR. PEELER: Yes.

MR. HERNANDEZ: My suggestion to the company would be to run a due diligence check. Depending on whether these other parties will be doing business with the government and where geographically it is based and where the business is going to be carried out, you will have a different scale of risk. And depending on that, you should run a deeper or stronger or lesser due diligence process. But certainly due diligence is an obligation that you would carry out.

MR. PEELER: Could not agree more. The significance of that due diligence will also—it is not a get-out-of-jail-free-card or ultimate shield—but it does go a long way to show that you are a good company trying to do it right, and it is extremely important.

MR. HERNANDEZ: And basically it is essential to know what is that party that you're doing business with and whether or not you can show the DOJ later on that you did your due diligence.

MR. PEELER: Absolutely. Any other questions, Ollie?

OLIVER ARMAS: A question for David. With respect to confidentiality and arbitration, obviously, if you don't have it in your clause, or your applicable rules don't make the arbitration confidential, then it is not. It is private but not confidential. So as a matter of course do you always insert confidentiality into your arbitration clauses, or do you leave it on a situational basis?

MR. BURT: The question is as follows: given that confidentiality is not automatic in arbitration, that it is an inherently private proceeding but it doesn't have to be kept confidential unless it is contracted for or perhaps it appears in the rules of whatever the administering authority, do we as a matter of course always put in a confidentiality clause? And the answer really is yes. Because, although it may not be critical to value, it's just a benefit that costs nothing. Most of the time, if we have something that's going to arbitration, it is going to be some kind of a disruption in the supply chain, and those things can get exaggerated in the press if somebody gets a hold of it. Such as, "Oh, my goodness, DuPont's supply of something or other is insecure or they are having problems with their distributors." Well this kind of stuff happens all the time, and so there is no need to get excited. Most of the time we are on our way to working it out.

So yes, we do as a best practice include confidentiality clauses. I have to say that my attitude used to be different about that, and I would look situationally at every contract. Because I don't like to put in superfluities, and I don't like to feed the boilerplate beast. So I would do an evaluation each time, and each time I would find out yes, that's what the client always wants. Yes, sir.

MICHAEL GALLIGAN: David, I wanted to just come back to a point you raised in terms of the relationship between New York and English law. Obviously, the differences between English law and New York law may not be as dramatic as the differences between English law or New York law and maybe French and German law. But I think it is important not to just sort of pretend they are totally indistinguishable. New York law has an obligation of good faith; it's a restrained obligation of good faith. It is not in the German sort or the possibly broader French sense. But still there is an obligation of good faith which you don't have in English law. I think if you're trying to exclude, if you want to say, "We are going forward and waive any possible misrepresentations or negotiations before we do our deal," that is easier to do under New York law than it is under English law.

New York law is statutorily very clear about the lack of a need for consideration for contractual amendments, assignments, or modifications in the way that I think English law is not as clear. England doesn't have a statute; it is all governed by case law.

So I sometimes find when I talk to attorneys about the distinction of New York law, people just sort of don't know what the differences are. Hopefully, the New York State Bar Association may be putting something out in a couple of years; we are working on trying to get a book published which will actually help educate people on those differences.

MR. BURT: I look forward to that.

MR. PEELER: Were there other hands?

Yes, sir, the gentleman. Can I ask your name, in the back.

JAMES MOORE: Jim Moore.

MR. PEELER: Hi, Jim.

MR. MOORE: This is to Mr. Burt. When you can persuade a foreign entity to participate in a mediated settlement conference, where do you get the mediator? I'm not asking what is the best way. How do foreign entities respond to having, say, a U.S. mediator, or would you have to defer to them?

MR. BURT: Most of the time—and maybe this is a little heretical—but most of the time if the other party is willing to engage in a mediation and if they have an idea as to a mediator and that person checks out, I view it most of the time as an advantage that that mediator is acceptable to the other party. But what's important is that the mediator checks out as somebody who is actually a member of the international ADR community, has significant experience, who we don't believe is going to bring any sort of local bias and is not in the pocket of the opposite member. But mediation is inherently cooperative. Particularly if we are in an area of the world where it is hard to get somebody to agree to negotiate in that fashion, most of the time my advice is sure, if they think this person is good. Now domestically, that's almost always true. Because there are an awful lot of good mediators, and it is easy to figure out who they are.

As to where they come from, you can go through the various arbitral centers; it is just a networking thing. You have to just keep talking to people in bars to find out who the good mediators are.

MR. PEELER: Bars in both sense of the word I'm sure.

Any other questions from the audience at this point, or shall we continue?

Okay, I wanted to throw it back to Andrew for a quick moment if I could. You talked about the significance of compliance. Even pulling your ten minutes of different themes you talked about due diligence and compliance. I wanted to spend a minute on the compliance side of that.

I wonder if you could expand a little bit on your thoughts and talk about what you're telling your clients in terms of practical steps they can take in the compliance arena to mitigate risk.

MR. OTIS: Yes, which is a little different than in the transactional arena, but I'll talk about it briefly.

There are a couple of elements to an effective environmental compliance program. One is that you actually have one.

MR. PEELER: Good place to start.

MR. OTIS: Yes. That you have an environmental compliance program that has a written set of procedures. It has a set of metrics by which you can measure environmental compliance. Those metrics are measured on a regular basis. There is feedback based on those metrics. The result of those feedbacks is incorporated into the performance evaluations and remuneration or any other way that managers are rewarded. Responsibility is clearly defined, and it is allocated amongst those who are able to make decisions. It is not that much different than any other compliance program. The other key—and I have clients who really vary on this—the other key is culture. You know, there was a joke when I worked at the EPA. New people would come in and they always want to reorganize the agency's seventy thousand employees, and the first thing they would say is, "Assume culture change. Okay, now that we have that done, everything else is easy." But creating a culture of compliance is really important.

I was struck actually when I was at a site recently, doing a site visit. This was not my client; I was with my client visiting another site that they were contemplating purchasing. It was a mine actually. We toured all over the mine, and we were going all different places. We were in a truck, and we must have stopped, I don't know, thirty times. And every time, they took these chocks that hold the wheels together out and they put them behind the wheels, whether we were on flat ground, on paved ground.

MR. PEELER: Was this a du Pont plant?

MR. OTIS: And we started making jokes about it. They said, "Look, it may not be necessary every time, but it just creates the culture of compliance and safety, and that allows us to press the workers constantly to think safety first and compliance first. And it works."

It's annoying, and it is not how we think of things as lawyers. It is kind of pedantic, but that ultimately is what ensures compliance.

MR. PEELER: And if I may, if I could dig a little deeper on that, a lot of times when I would talk about that same general message, the similarities between what we are talking about for the anti-corruption and the environmental is stark. But a lot of times clients are looking for as much practical advice, like, "How do I go from the advice you just gave, which is a very good and right strategy; how do I begin to turn that culture around in my company?"

MR. OTIS: In that same trip we were having that discussion about how you change culture within a company. And one of the managers made a joke, and he said, "You fire everybody and you bring in people who have the new culture."

MR. PEELER: That's option one.

MR. OTIS: Right, option one. But that may have some other issues associated with it. But the key thing to keep in mind here is key managers have to believe it and do it. So if you want the first practical step, the client comes to me, the environmental manager comes to me and says, "Okay, well, what's my first step?" I say, "The first thing you do is you do it every day and all the time."

The second step is written procedures—like this book for example—is key, so that everybody has the same point of reference.

A third practical step is set up an education program. So whom do you want to educate and how do you want to do it? How often will your environmental managers meet together? How often will they go through a refresher course? Will you test them? What are the criteria by which you want to evaluate their knowledge of your safety procedures?

The fourth practical thing that you can do is to determine that their compensation is based on it, and that's not that hard. And it has to go outside the environmental area, and it has to go to plant managers in particular.

MR. BURT: Can I just get in on that a little bit.

MR. PEELER: By all means.

MR. BURT: My Cousin Vinny speech. Everything that guy just said is right, and that's exactly the way that we would have said it, which is amazing. It's got to be top-down driven. It's got to be part of an education program. When you educate people and the idea catches on, pretty soon there is a demand for education.

For instance, in the last three months I've had requests to come and discuss alternative dispute resolution from the IP arm of a legal department and from the

sourcing function itself. My best client: Sourcing. Which is interesting. What that means is there is now a demand for this information, and in that fashion it is getting driven up the business organization and into the culture. Linking it to people's compensation is great.

Just one example of a culture shift that we seem to have achieved, though it took about ten years, was to talk about recoveries. To stimulate everybody at every level of the company to look for opportunities where we might be leaving value on the table, to get legal intervention where necessary to get that value back. And it's just a relentless effort that is required to market this kind of stuff to create culture change inside a company. A message from the CEO really helps. Creating actual marketing materials. Having it reinforced in splash screens. Whenever I flip down the tray table on the airliner and there is an ad there I think of the recoveries program. The door magnet, maybe that's a little old fashioned at this point. But great answer.

MR. PEELER: And I couldn't agree more from the anti-corruption side.

It reminds me of a story in which I was giving these same messages to a very large multi-national corporation. One day I found myself in a large factory of that company in a region in China, and the manager of that place was an American who had come over and was beginning to implement many of these things we were talking about. He was proudly walking me through the plant and showing me what he had achieved, almost as if he were literally ticking off the box what he had done. We got to a large sign that had a hotline information and what to do if you spotted a problem and all of that. I said, "You know, Jim, that is fantastic. There is only one problem." He almost looked crestfallen. He turned to me and said, "What?" I said, "I can read it." He had simply failed to recognize the fact that it was in English and that the two of us were the only two people able to read it. The message was fantastic; it just needed to be translated into Mandarin.

It goes back to that cultural prism piece, which is not only that you do the right things, but you have to think about it as you do it how to be really sensitive in getting it out there. Again, that comes from the top down. A number of times, when, I've heard a manager say, "I'm really trying hard," I have said, "When is the last time you visited the plant? When is the last time you made a physical appearance and when you were there were talking about these issues?" If the answer is none, I've said, "Then we need to do better."

MR. OTIS: I just want to respond to one thing. I have clients who struggle with this: There are a lot of other large multinational public companies who have one program for the entire world, and every facility you go into, every facility and it is exactly the same. And that is a very viable way to do it. I have other clients who do it slightly differently, and they want each facility to structure their program in a way that is both culturally adaptive and also fits within the value proposition of that entity. My view is that that has greater risks. You take those risks and you make the trade-offs, but I definitely see a couple of different ways that it gets done.

MR. PEELER: Yes, a question.

AUDIENCE MEMBER: And this is a question for Andy, actually, about environmental risk if you are representing a buyer of real estate, and I'm going back a long period of time in which charities, for instance, would not take real estate as a donation—because of the risks. What type of escrow agreements and for how long a period of time would you have it be for environmental damages on real estate?

MR. OTIS: That's a good question. It really depends on how much investigation I've done prior to the transaction. So if I've done a significant amount of investigation, and I feel pretty confident there is not much going on here, I probably wouldn't take an escrow agreement if I didn't have to. But if I didn't, and I was kind of going in with representations only or Phase I, it really depends. It also depends on the size of the transaction. Escrows are often pegged to the total amount.

I know that people love to say, "Well, for the statute of limitations." In the environmental area it just doesn't work. There really isn't a statute of limitations on contamination. The EPA loves to say that as long as you're not in compliance you're renewing the statute of limitations every instance of noncompliance. They don't always win that argument, but do you really want to spend your time fighting with the EPA over whether you've violated the statute? It really is deal dependent.

My deal on escrows also is that, if you think the parties can interact after the transaction, then escrow is fine. But escrow is just another opportunity to fight. You need a real good procedure to determine how to disburse escrow funds, because an escrow agent is not going to determine whether remediation is necessary, or reasonable, or whether this is the right amount of remediation. All of that needs to be done after the closing, so it really depends on the nature of the parties involved.

AUDIENCE MEMBER: The reason for the escrow account is that there will be funds available, even though it may not be the full amount. I'm reminded of ancient graveyards found in New York on real property that stopped all building, that had to be remediated, things that wouldn't be found in a normal test of the ground.

II. See Ya In…Where? Is Arbitration a Viable Dispute Resolution Option in International Financial Transactions?

MR. PIEPER: The topic of our second panel is what if there is a dispute in an international transaction, how do you resolve this? And here we want to focus on financial disputes. Traditionally, I understand, in particular the banks would go to the courts, but recently there has been a new development where people are thinking, "Well, why don't we try arbitration? Are there advantages, disadvantages?" So the old saying, "See you in court," might not work any longer in all circumstances. So maybe now it is, "See you in…I don't know, in the Hague maybe." We have a whole panel to discuss this issue.

My partner, Marc Rossell, is interestingly enough a capital markets guy, and he will lead the discussion on arbitration. So I will leave it to Marc to introduce the panel and to take it from here.

MARC ROSSELL: Thank you, Thomas.

As Thomas mentioned, I'm a poor corporate lawyer, so I really don't know much about arbitration or litigation. But I do have a topic which we are going to discuss today—which is the use of arbitration or potential use of arbitration in financial transactions.

Before I start, I'll briefly introduce our panel. We have Eduardo Lopez-Sandoval, a partner at the Peruvian law firm of Rodrigo, Elias & Medrano, to provide a little local flavor on the enforcement issues related to arbitration, awards and court judgments in local countries. Eduardo also has the disadvantage of being a corporate lawyer, but knows enough about this to talk a little bit about it. Great that you could join our panel.

Giselle Leonardo is a leading practitioner in the area of arbitration on finance and M&A, and in cross-border disputes in particular.

Henry Weisburg is a partner at Shearman & Sterling, a former partner of mine, and has experience in the area of cross-border litigation and arbitration proceedings, and he spends approximately eighty-five percent of his time on arbitration matters.

To his right is Valerie Verberne. She's a lawyer at NautaDutilh, based in New York. She will talk a little bit at some point about P.R.I.M.E. Finance, which is an innovative idea in the area of arbitration for financial transactions, which her firm was fairly important in establishing in Europe as an example of how you might want to address financial transactions in arbitration.

The hypothetical is the genesis of this discussion. This is really an issues awareness panel as opposed to presentations, apart from Valerie's presentation. But it is the following issue.

I grew up in the corporate world in financial transactions, where either you have a syndicated loan agreement, a cross-border syndication, or indentures for bond issuances, where the normal clause for that agreement says that, in the case of nonpayment or default, the borrower submits to the jurisdiction of the New York courts, appoints a process agent, and New York law obviously governs the debt obligation. The remedy of choice of the creditor is if I lent a hundred million to this borrower, the borrower didn't pay me the hundred million, and if it doesn't pay me my hundred million dollars, I will go into the New York court and get my judgment. He has appointed the process agent, a very easy way to get a summary judgment, and I'll go enforce that court judgment in the local country and undertake a proceeding in the local jurisdiction to enforce the local judgment and exercise my remedies, try to attach assets, whatever.

Creditors have sort of shied away from arbitration for a number of reasons. One is that—and we can talk about this in a little more detail—they don't think there is much to arbitrate about. It is fairly simple. It is not like a big construction project in a project finance, where you're trying to figure out what the degree of workmanlike conduct was or if something was subject to a warranty or not. It is fairly easy. I lent a hundred million dollars and they didn't pay it. It is fairly easy. No arbitral issue of fact. The other thing is it could be lengthy, an arbitration process, and we will talk about that. Creditors like the idea of being able to go into a New York court and with a summary judgment proceeding get something out of the court in maybe six to eight months, depending on the facts, and then go enforce it in the local country immediately.

They also don't like the idea of arbitration because historically—Henry will disagree with me on this—but historically what has been viewed a little as a "split-the-baby" kind of thinking: while a court will very easily recognize or should very easily recognize the fact that the debt is owed and under the law the borrower has to pay, an arbitrator may have a tendency to have equitable principles creep into the decision-making—so that you might not end up with a hundred million dollar judgment, but you might end up with something else because of something the arbitrator thinks was equitably involved. So there is that issue.

So creditors have typically not liked this, and a substantial majority of all New York law financial transactions have submission to jurisdiction in New York courts, federal and state courts sitting in New York.

Then some of us who do international financial transactions started talking to local lawyers and asked them the question, "Have you enforced New York judgments in that country? How long does it take?" And oftentimes, in particular the jurisdictions in which I have a habit of working, like Brazil, Mexico and Argentina, you get the answer that it takes a long time. Because in theory it is

easy to get a proceeding started to enforce the judgment, but the debtor has a lot of defenses that it can interject into the proceeding, so it takes a long time to actually get a judgment—if you get a judgment at all. There are public policy issues and other defenses they can raise, or the fact that they haven't been properly served.

So you ask the lawyers, "Well, what about an arbitration award?" And to the extent that the country in question is party to the New York Convention, which is a convention on the recognition of foreign arbitral awards, then it is oftentimes viewed as easier to get enforcement of an arbitration award than the judgment of a New York court.

So as a creditor you start asking yourself the question, "Well, why don't I consider arbitration? Because if I can get an arbitral decision in the same time frame and the same speed as a judicial decision, perhaps it is easier for me or better for me to get an arbitration award and enforce that in the local country."

So how many people are litigators here by the way?

(Show of hands.)

Quite a few. I guess I'm in the majority.

So I guess one of the things we might want to do is ask Eduardo to say whether this is very different depending on jurisdiction, because based on what I have come to know, it's clear that the arbitration award might be a better option, but not necessarily in all countries.

So Eduardo, maybe you can take a minute to talk a little bit about in Peru: If you have a court judgment or an arbitration award, which one would you rather have to enforce?

EDUARDO LOPEZ-SANDOVAL: Well, thank you, Marc.

The first thing that we should probably mention is that this is not something that happens every day in countries like Peru and around Latin America. You don't see foreign awards issued by foreign courts or arbitration panels recognized and enforced in Peru every day. Based on that, the amount of case experience that you have in Peruvian courts on this matter is very limited.

We have had some experience in our firm dealing with recognition of foreign awards issued by both courts and arbitration panels. And our first conclusion is that in both cases it is really, really complicated. It is something very complex and takes quite a while. If you think enforcing a foreign judgment or arbitration award in a foreign jurisdiction is quite easy, you should expect to spend in Peru probably at least two or three years until you get a final decision or resolution.

When it comes to the requirements of enforcing court judgments versus arbitration panel awards, I'm going to discuss some history here. Arbitration in Peru is something very new. We have been hearing about arbitration for the past twenty years, so most of the courts at the moment have little experience enforcing foreign awards. The experience on arbitration cases is very, very limited because arbitration is not something that was well-known in Peru until very recently. In the past twenty years arbitration has become quite fashionable in Peru. Nowadays there is probably no important commercial mercantile contract in Peru that is not subject to arbitration. Everything is subject to arbitration, and as such we have started to develop a system that is very favorable toward an arbitration award. In part the system that we have created is a system of recognition and recognition of foreign arbitration awards that pretty much replicates what the New York Convention requires.

We are probably going to talk about the New York Convention now, and this is probably the cornerstone for the enforcement of arbitration awards in foreign countries. Peru is a signatory to the New York Convention, and we have already passed the internal regulation that is required to get the New York Convention rules applicable in Peru.

So when you compare the enforcement of court judgment and arbitration awards, from a substantive point of view there isn't much difference. I mean that the issues that one may raise as a defense are quite similar in the sense that there are certain matters that cannot be recognized in Peru, whether they come from a foreign court or an arbitration award, such as matters relating to lands in Peru, matters relating to family law and those sorts of things. There is also this other general concept of internal public policy order that applies both to arbitration awards and court orders.

Then we get into the field of the procedural issues, which is pretty much where you see most of the discussions at the local court levels when it comes to enforcement of foreign awards.

The procedural issues and the due process issues, most of the defenses raised by debtors in enforcement proceedings in Peru deal with the foreign procedure in which this resolution or decision was passed. If there was a mistake in this part of the procedure, then that mistake makes that whole procedure tainted. It's the same case with the arbitration awards. What happens probably is that if you compare the procedural rules for both the issuance of a foreign court decision and an arbitration award, arbitration tends to be much more of a simplified procedure, and as such probably the chances of seeing a procedural mistake identified in the course of an arbitration proceeding may be less likely to occur than in a foreign judicial proceeding.

MR. ROSSELL: Maybe we should stop for a moment and talk about the New York Convention, since some of you are not litigators.

Henry, do you want to talk about what is the New York Convention and why it is important for enforcement of arbitration awards.

HENRY WEISBURG: And I'm sure Giselle will have plenty to add.

There is a real irony in the legal world, which has already been referred to, which is that in most countries—Peru may be something of an exception—it is far easier to enforce an arbitration award than a judgment. As you know, the United States, for example, is not party to a single cross-border judgment enforcement treaty. So if you get a beautiful judgment with a red ribbon on it in New York, you have to take it to another country to enforce. In a lot of countries that allows a re-opening of the merits to some degree, et cetera, and the procedures are extremely diverse around the world. So a New York judgment is in some circumstances of limited value—it's a step forward, but it's not that much of a step forward, in terms of enforcing your rights against assets of a judgment debtor in another country.

In contrast, in the arbitration field we have probably one of the most successful commercial treaties ever anywhere, which is the New York Convention of 1958, to which at least one hundred fifty countries are subscribers, state parties. The New York Convention, which is only about five or six pages long, basically requires signatory states to enforce private arbitration agreements so you can get enforcement against somebody of their obligation to arbitrate, so that's at the beginning. And at the end it requires signatory states to recognize arbitration awards.

There is one critical article, the most critical article perhaps in the New York Convention, which is Article 5, which has a very limited list of reasons that a court in a signatory state may use to decline to enforce an arbitration award. It is written in very constitutional terms, and that list of excuses to not enforce include things like failure to give notice that the arbitration is afoot, gross breaches of due process, gross excess of jurisdiction, of the exercise of jurisdiction by arbitrators. In other words, they decide something that is not remitted to them under the relevant arbitration clause. But they are quite limited.

Obviously in those one hundred fifty plus countries you have judicial decisions construing those provisions of Article 5, which can be more or less favorable to awarding enforcement. But in concept and in reality in most or many commercial countries that list is read very narrowly. So the bottom line is that if I have a hundred million dollar judgment or a hundred million dollar arbitration award and somebody offers to sell me one of each of those, against the same obligor with the same credit standing and the same assets, I'm probably going to pay more, frankly, for the arbitration award. It's going to be more enforceable. And in a lot of important commercial countries—certainly continental Europe, Switzerland, France—it is pretty much the same. In England and increasingly in the emerging countries—formerly emerging countries, now emerged, like Brazil—these arbitration awards are very speedily enforced far more quickly than a judgment.

This isn't to say that there aren't a lot of other issues in selecting arbitration, and we can get to those. And Marc's hypothetical arbitration is certainly not appropriate for every kind of contract. But at least in terms of that end product, what you do with what you get, that piece of paper: litigation just gives you a piece of paper, in the form of a judgment. It doesn't give you money necessarily. It is a matter of what you can do with that piece of paper while a judgment. An arbitration award probably in many countries is a more attractive piece of paper.

AUDIENCE MEMBER: Just a quick question. Does the arbitration have to have been done under the auspices of any particular organizations?

MR. WEISBURG: No. The New York Convention is absolutely agnostic as to whether it is so-called administered arbitration or ad hoc arbitration.

MR. ROSSELL: By the way, we welcome questions.

GISELLE LEONARDO: I just want to follow on with that. Before I was an arbitrator I came from a transactional background. For many years I was in-house counsel with a multinational energy developer. To answer this question specifically, when you draft the clauses, you can set forth whether it is institutional or ad hoc, and then you can specify the rules. So the identification of the administering institution—whether there is one or not or whether it is going to be ad hoc in the selection of the rules—is independent of the recognition and enforcement mechanisms under the New York Convention.

MR. WEISBURG: My personal view is it's always a mistake to go ad hoc, but that's a separate issue.

AUDIENCE MEMBER: No, I understand. I just wondered about the enforcement.

MR. WEISBURG: As far as the New York Convention is concerned, it doesn't matter.

MS. LEONARDO: Just to add one quick point following on Henry's position there, the New York Convention does not permit any review whatsoever on the merits, and the grounds for refusal are exhaustive. When they list, and Henry mentioned most of them, but when they list the grounds for refusal of recognition and enforcement, those are exclusive. Those are the only grounds.

MR. WEISBURG: Subject to some exceptions in some countries, but generally.

MS. LEONARDO: Correct, there are some exceptions, and there are some other issues on public policy. We can get to that if we have time: the public policy in the country you're looking to enforce, et cetera. But we can get to that later.

MR. WEISBURG: The main point is that it is a very confined list. And as Valerie said, no review of the facts, and in fact, no review of the law—the law as applied by the arbitrators.

MR. ROSSELL: Henry, have you had experience with local counsel actually enforcing a judgment for money owed?

MR. WEISBURG: Do you mean an incoming judgment?

MR. ROSSELL: No, in the local country, through local lawyers.

MR. WEISBURG: Yes.

MR. ROSSELL: What has been your experience in terms of time horizons?

MR. WEISBURG: Do you mean vis-à-vis an award?

MR. ROSSELL: Yes.

MR. WEISBURG: Again, like any other litigation, it is highly variable. As I said, the sad reality for litigators is that at the end of a lawsuit you get another piece of paper. So how do you turn that into cash? I've had very good experiences in basically taking New York judgments and getting them enforced in probably as little as two or three months in some jurisdictions. If you go—I won't pick on countries—but if you go to someplace like Pakistan, it could be ten, twenty years.

MR. ROSSELL: And in some countries there are actually other legal constraints in enforcing a foreign judgment at all, as I understand it.

MR. WEISBURG: Right, in offshore jurisdictions.

MS. LEONARDO: Correct. And if you're doing transitional transactions and you are drafting, one of the things I would look at before you finish your clauses is to go look at that country and the enforcement mechanisms. Because, as you pointed out, in Pakistan (I haven't looked at the law recently, but I did a deal there many years ago) one of the things we figured out right away was that they didn't enforce foreign judgments—but they would take the foreign arbitral award.

I would encourage everyone as one of your due diligence checklist items to look at the country and determine will they recognize the arbitral award or the judgment.

MR. WEISBURG: Although sometimes you know where your debtor has its assets, the attraction of the New York Convention is that it opens the case to one hundred fifty countries. At the time you made the loan they may have had large cash collateral in X country, but by the time of default it may be in my country.

MR. ROSSELL: The simple hypothetical that I've asked myself is whether a debtor is in—let's say, pick a country—Peru or Mexico, with no assets in the United States and no guarantors of its obligations in the United States, so in other words you're forced to go to the local country against the assets there. That's the end game. If you had a guarantor in the U.S. or you had assets in the U.S., you might think twice about arbitration, because a New York judgment might actually be easier to enforce in Arkansas where they had a subsidiary with a factory or something like that. That's a hypothetical.

Did you have a question?

AUDIENCE MEMBER: I did. I'm thinking back to a World Bank Lex Mundi study about ten years ago that I participated in. One of the things that you have to be looking at here is that, if you're a bank and you have a note, that's a financial asset. And you shouldn't be getting yourself into a position where you are going to have trouble collecting it, because that infects the integrity of the asset. So therefore, you have credit committee decisions: Is this going to be a balance sheet loan or is this going to be an asset-backed loan, and if so, what assets and how are we going to back them up so that we have real teeth if the loan goes into default.

I think one of the things that came out of that study, which people were talking about earlier, is sometimes arbitrators kick.

MR. ROSSELL: That's the equitable principles issue.

AUDIENCE MEMBER: Something like that, and it adds a different dimension of risk as to what is the value to the bank of that financial asset. Unfortunately in arbitration you cannot appeal all the time. As a matter of fact, you rarely can appeal; there are some jurisdictions where you can.

So if you have a financial asset at par for, let's say, a hundred dollars, and the arbitrator comes in and for some reason maybe he thinks the interest rate is a little excessive, and now you have an arbitral award for ninety dollars, so you've affected the value of that banking asset. I'm wondering if the panel would care to focus on that?

MR. ROSSELL: Well, Henry, perhaps you can comment on that.

MR. WEISBURG: Yes, again, I'm not deluded about the strengths or weaknesses of arbitration. I have spent the last couple decades in debates: Should we use arbitration? Should we use litigation? And yes, as Marc cata-

loged and one of the major things that people say is, "Oh, they are going to cut the baby, you know, it's too much equity." I certainly agree that that's probably an appropriate attitude sometimes. But if I'm suing on the most plain vanilla note, or what we call a New York Form Guaranty, basically to which there is virtually no defense, probably arbitration doesn't make sense.

To get to your point. Obviously I am basing this on my own experience and some research. First of all, there is no statistical support, I don't think, for the notion that arbitrators come down in the middle—you know, cut the baby in half—any more than judges do. Because judges do the same kind of application of public policy. They drag in usury and all kinds of concepts people use to adjust financial obligations. In my own experience I haven't seen that. I mean I have seen arbitrators—and we spend a huge amount of time picking our arbitrators obviously, so we hope that we do the right thing in selecting the right arbitrators—and that's what P.R.I.M.E. Finance is all about—to know the area and to enforce the parties' intention as drafted. So that's my own experience.

AUDIENCE MEMBER: I was going to ask, in the type of situation that Jim is referring to, are there ways of giving more protection, such as a requirement that decisions be made as a matter of law, and maybe possibly other restrictions on the arbitrators?

MR. ROSSELL: That's a key question. Let's assume for a minute that in your country that arbitration might be appropriate (and we will talk later about whether it should be an option or mandatory). But let's assume you've decided it will be easier to enforce an arbitration award rather than the court judgment. Let's assume that you include in your financial agreement that there is an option to arbitrate. What should that arbitration clause look like? Because what you don't want to do, I think, is have a situation where I've decided I've increased my enforcement mechanism, I have enhanced my enforcement mechanism in a local country, making it very easy to enforce. So I cut down on the enforcement proceedings from two to three years to six months or nine months, so I've gained a lot of time there. But what if it takes me two years to get an arbitration or it takes me six months to get a summary judgment? How do you construct an arbitration clause in the financial agreement that works somewhat like a summary judgment proceeding? We will talk in a little bit where to find it in the Hague. But Henry, to get a summary judgment in New York on a note that is due is between what and what?

MR. WEISBURG: Well, to get back to your question, yes, there are a lot of things you can do. There are some structural deficiencies, however. The real model, to get back to the hypothetical, in New York we have this wonderful provision that certainly litigators are familiar within CPLR 3213, motion for summary judgment in lieu of complaint. So if you have the simplest financial instrument, promissory note in New York, you can probably get a summary judgment if you have a cooperative judge in probably three months, which for litigation is lightning speed. You probably can't replicate that in arbitration. You can work on this in your drafting.

Probably the real structural problem in arbitration vis-a-vis court at the procedural level is getting the arbitrators installed. I tend to have very large cases, and I'd say the average time to get the tribunal installed—all right, so I don't have cases with notes too often but much more complicated than that—and usually I would say it takes four, five months before the tribunal is convened. That is a very bad statistic. If you gave me a note to sue on, I could be before a judge before dinner, right? So that's a problem.

Now, you can draft various provisions, and the administrative agencies like the ICC or AAA, the institutions, will assist you in getting arbitrators in place more quickly. But that's always going to be a problem. Once that's happened, through your drafting you can pretty much replicate the speed of court and choose which advantages in the court system you might want. For example—and this is a relatively new development, at least in terms of what I've seen over the last twenty years—you can put in basically a summary judgment clause.

Traditionally arbitrators were more reluctant to decide without having a hearing, even if it was just a pure question of law. I think that culture has now changed. We quite frequently see in clauses something that basically empowers the arbitrators to dispose of a matter that meets certain conditions, like just a question of law, no questions of fact on a summary judgment type basis. So that is a great acceleration that I am seeing particularly more sophisticated arbitrators accept.

In no particular order, another thing somebody mentioned, one aspect of arbitration, and sometimes it is viewed as a deficiency and sometimes it is viewed as an advantage, is no appeal. Now generally as we have said in the U.S., there is no judicial review of questions of law in an arbitration award. But you need to think, we are talking internationally.

Under the English Arbitration Act there is a provision that you can opt into which does allow the court to review questions of law decided by arbitrators. So you can dial that in, if you want, by your drafting.

AUDIENCE MEMBER: Do you think you can do that under the FAA?

MR. WEISBURG: No, there is decisional law that you can't do that. There have been cases where people have tied to do it and courts have tried to do it and have been shut down. So I don't think you can expand that way. But the English Section 69 of the Arbitration Act very clearly allows you to do it.

The other criticism, which Marc didn't mention, that comes up a lot in arbitration, as to which there has been a lot of progress over the last ten, fifteen years, is lack of ability to get effective preliminary relief. This guy is going down the tubes or he's a fraudster and he is moving his assets to wherever, he is shredding his documents or burning down his factory for insurance money or whatever bad stuff people do. One of the traditional advantages of court was you go in and get an injunction, maybe you could even get the marshal to go and grab the factory or whatever it is. Increasingly there are arbitration clauses and rules of the institutions which allow you to mimic that kind of emergency relief. And particularly the ICC mechanism, ICC being a major administrator of arbitrations, and it has a very effective sort of emergency arbitrator kind of provision.

So again drafting, you really need to have a menu, check this off, check this off, we want this, we want that. You can also have a split clause which allows you to go to court, particularly during that early period before you have arbitrators in place to get preliminary relief. But that is again a common complaint you hear, which you can actually resolve through drafting.

MS. LEONARDO: Can I just chime in? That's correct that you can attack it in the drafting. But additionally, if you specify certain institutions, and Henry mentioned the ICC and ICDR and some of these other international institutions, if your panel is not convened and you have an emergency or an interim or some kind of issue where you're seeking emergency relief, injunctive relief or whatever, by specifying the institution in those rules you may have recourse through that. But certainly if you inadvertently omitted that, you may still have a saving grace by the election of the institution.

Recently the ICC and ICDR and some of these others have been reviewing and instituting their policies. For example, if you have an issue of wasting of assets or depletion of assets or somebody is absconding or wiring your monies away, et cetera, you may be able to petition, put in your motion, say, "We are requesting emergency or injunctive relief"—or whatever. They will constitute an emergency arbitrator, which may not be your panel of three that is constituted. As Henry discussed, there is a fair amount of time in vetting to get your full panel in place. But don't think the arbitration community is not moving swiftly and quickly to try to give you emergency and injunctive relief as appropriate.

MR. ROSSELL: If I'm a creditor I guess there are a couple of things. One you said is lack of effective preliminary relief. If you have a borrower with no assets in the U.S. and no guarantors, getting an injunction or specific performance may not be as important. Does the arbitration clause foreclose you from doing that in local country? You may have some remedies there.

MR. WEISBURG: Yes, and again, you should draft for that.

MR. ROSSELL: To allow for that remedy to be exercised.

The other thing, in terms of a panel of three, as a creditor, if I want to replicate a fast proceeding in New York with an arbitration panel, I guess I'd want one arbitrator as opposed to three, right? In other words, try to make it simple.

MS. LEONARDO: Right, and you can certainly specify in your clause drafting that amounts in excess of X million will be heard by a three-person panel; amounts less than this by a one-person panel. You can certainly specify that, or you can specify independent of the money and the thresholds whether you want one or three arbitrators.

Going back to a point that both Marc and Henry touched on, specifically in your drafting in your arbitration provision, you can craft the remedies that the arbitration panel is empowered to deal with. And certainly, like you're talking about this summary judgment standard and some of these others, you can take a look at that and include that in the drafting of your clause. Specifically in a remedy section that grants or confers the certain powers on the arbitral tribunal to address those matters.

MR. ROSSELL: How much time do you think it would take, if you tried to construct an arbitration clause for a financial agreement, what is the period of time that is the least? How fast could you get an arbitration award if you had one arbitrator and some sort of process by which people plead? Could you replicate it and do it in three months, is that possible?

MR. WEISBURG: Yes, you can. And that would be lickety-split. But yes, you could do it.

One mechanism that I've seen—and I'm sure Valerie has seen it even more often, especially in the construction area—is to select the arbitrator at the time of contracting. I haven't seen that in financial contracts, but one could in the right circumstance think about that. But again, in the construction field—where no building goes up without a dispute—you can pick somebody who is on board basically ready to decide disputes from day one.

MS. LEONARDO: That's an interesting point, actually. I was consulted on a matter some years ago involving some large financial institutions, and they asked, "Would you be on standby ready to rule on these things? There are four or five parties; we will get on a conference call. We will fax you the documents, and you can make some kind of decision or ruling." So certainly you can elect an individual.

I will say there is a downside. Because if that individual is either not available, no longer in the practice of law,

deceased, et cetera, you may not have recourse to that person. Now, what you can do is say, "We all agree on person John Smith to serve as our arbitrator on whatever. Absent he or she being able to serve, we would prefer an arbitrator with twenty years of experience or more in the financial industry, transactions, et cetera, et cetera." But don't draft that too narrowly. Because what happens—and that is one of my pitfalls to avoid in the short list—you are overzealous or over-enthusiastic in your drafting, you will draft it so narrowly on whom you want your arbitrator to be that you will end in up in a situation where you won't get anyone appointed. So if you have basic things, someone with twenty years of construction work, someone with twenty years of financial transactions or M&A, leave it wide enough open so you will be able to find someone. But tailor it to the type of industry experience or technical experience that you need.

One of the advantages of arbitration is picking your judge. That is what you are paying for. You are able to handpick the individual that you want to hear your dispute. So in a construction dispute you may want an engineer or someone with project management experience, who may also be an attorney. You may want someone who built ethanol or methanol or whatever type of facilities in Africa. So you can actually pick that type of qualification in the selection of your arbitrator.

MR. ROSSELL: This might be a good segue to the P.R.I.M.E. Finance solution to financial transactions.

Maybe, Valerie, you can take a little bit of time to talk about what that is and the experience so far.

VALERIE VERBERNE: Of course. Thank you, Marc.

Today I'm filling in for Professor Gerard Meijer, who is Professor of Arbitration Law and Dispute Resolution at the Erasmus School of Law in Rotterdam, Netherlands. He is also Secretary General of P.R.I.M.E. Finance and partner at NautaDutilh. And as Marc mentioned, I'm a lawyer at NautaDutilh, a law firm that is closely involved in the establishment of P.R.I.M.E. Finance.

Well, today I would like to tell you about the market response for dispute resolution regarding complex financial products, being P.R.I.M.E. Finance. In the past decade we have observed increasingly the use of complex financial instruments, such as derivatives. And those instruments cross borders with great speed. And as a result of these developments, a significant number of contracts are entered into between parties, and these parties often have seats in different states. Very often one of these parties will have a seat in a developing state where court judgments are not or are not so easily enforceable, and where the judiciary is less familiar with rapid developments in international financial markets. That is one of the reasons why we have established a newly created dispute resolution facility, being P.R.I.M.E. Finance, which will be my topic of presentation.

But first I would like to point out a few reasons to opt for arbitration. Afterwards, I will outline unique features of P.R.I.M.E. Finance. For starters, the organizational structure; then I will elaborate on the services of P.R.I.M.E. Finance, P.R.I.M.E. Finance expert lists, and I will conclude with the finance arbitration rules of P.R.I.M.E. Finance.

So why opt for arbitration in the first place? Well, we just discussed the New York Convention on recognition and enforcement of foreign arbitral awards, so I will not go further into that one. But let me point out that, except for Europe, where we have the Lugano Convention and the Brussels 1 Regulation, there is no similar mechanism for recognition and enforcement of foreign court judgments available internationally.

There are also other additional features which will make arbitration very attractive in comparison with litigation. As Giselle mentioned already, parties are free to determine the composition of the arbitral tribunal. Nearly everyone is able to sit as an arbitrator, and therefore parties are able to determine a desired technical expertise of arbitrators and also they can choose their nationalities.

Secondly, parties are masters of the procedure. They can modify the rules to suit their needs best in arbitration. However, they cannot derogate merely from several generally recognized principles of due process.

Another attractive feature of arbitration over a state court litigation is confidentiality. Arbitral proceedings are confidential and only parties and arbitrators are aware of the issues involved.

Now let me give some background about P.R.I.M.E. Finance and what it stands for. It stands for a Panel of Recognized International Market Experts in Finance. It is a recently opened dispute resolution facility for the financial markets, and it is based in the Hague in the Netherlands.

Conceived against the backdrop of the financial crisis, P.R.I.M.E. Finance is a new complement to global regulatory reform. It is established both to help resolve and to assist judicial systems in the resolution of disputes about complex financial transactions. It's core activities consist of arbitration and mediation, but we also provide judicial training to judges and arbitrators and our experts, and we provide expert opinions and risk assessments. The tribunal was opened in January 2012 at the Peace Palace in the Hague by the Dutch Finance Minister. And I am pleased to report that since then P.R.I.M.E. Finance won the best newcomer award at the Global Arbitration Review at the ceremony in Stockholm of last year.

Before establishment of P.R.I.M.E. Finance, a feasibility study was conducted by leading financial disciplines in financial markets, like London, New York, Moscow, Dubai, New York, and Frankfurt, in order to discuss what

services P.R.I.M.E. Finance should aim to provide and what should be its scope of expertise. The research concluded that P.R.I.M.E. Finance has unparalleled expertise. And it should focus on the wholesale financial market and resolutions concerning complex financial transactions between highly sophisticated entities, mostly business type of cases.

There is an Advisory Board of P.R.I.M.E. Finance, and a U.S. citizen, Mr. Thomas Jasper, the founder and Chairman of ISDA, is a member of the Advisory Board. As for the Management Board, Professor Jeffrey Golden, Professor at the London School of Economics and Political Science and a founding partner of Allen & Overy, is on the management board.

MR. ROSSELL: Valerie, just a question. Is it fair to say that P.R.I.M.E. Finance was set up primarily to deal with derivatives, or is that unfair characterization?

MS. VERBERNE: No, I would say all complex financial products.

MR. ROSSELL: So it could include loan agreements or—

MS. VERBERNE: Yes. Derivatives is just an example

MR. ROSSELL: All right.

MS. VERBERNE: The most distinguishing feature and a key asset of P.R.I.M.E. Finance, I would say, is its expert list. P.R.I.M.E. Finance is now a truly international panel of the most senior and legal market experts in the field. If you look at the website, www.primefinancedisputes.org, you can see a whole list of arbitrators and market experts in the field. To mention some names that might be mean something to you, Professor Jan Paulsson, Judge Stephen Schwebel and Professor Albert Jan van den Berg, just to mention a few.

There are three main pillars on which P.R.I.M.E. Finance is based. Those are dispute resolution services, judicial training, and database services. As already mentioned, the dispute resolution services include mainly arbitration and mediation. However, we also offer expert opinions and risk assessments.

Also P.R.I.M.E. Finance, jointly with other leading international institutions, will provide training to its experts to keep their knowledge updated and adequate. With regard to the database services, in cooperation with LexisNexis, P.R.I.M.E. Finance is now setting up a specialized database of cases and other resources dedicated purely to complex financial transactions.

The P.R.I.M.E. Finance arbitration rules are based on the UNCITRAL rules, which were adopted in 1976 and revised in 2010. As you know, these rules are well tested and widely accepted, and we decided to make use of them and only to adjust them where necessary. Under the UNCITRAL rules parties can make use of the services of a so-called Appointing Authority. This will mean that, for example, if parties cannot reach agreement on the appointment of the arbitrators, the Appointing Authority may step in, and this might be the Secretary General of the Permanent Court of Arbitration, which has a seat in the Peace Palace in the Hague.

P.R.I.M.E. Finance will provide services where it concerns the overall administration of the arbitration proceedings—for instance, the exchange of documents, the list of experts, the certification of awards and also the deposits of costs.

The international financial community is more and more keen to explore advantages of arbitration in complex financial disputes. This can be illustrated by a consultation process conducted by the International Swaps and Derivatives Association, ISDA, with its members including a dispute resolution clause in the ISDA Master Agreement. This is an alternative to the currently used jurisdiction clause. I can inform you that the consultation process is nearly concluded and in fact it has been announced that in early 2013 it will draft and publish on its website several more clauses with different arbitration venues. It will also publish a guide for its users of main features about arbitration, since financial experts are not normally familiar with the arbitration practice.

Now let me highlight some of the arbitration rules. I will start with the appointment of arbitrators. The parties and the Appointing Authority will choose exclusively from the P.R.I.M.E. Finance list of approved arbitrators, which can be found on the website. And unless it is agreed otherwise, there will be three arbitrators appointed. In Article 8 of the rules you can find the procedure for the appointment of only one arbitrator. In principle this one arbitrator will be appointed jointly by the parties, but if the parties fail to agree on the arbitrator, then the arbitrator can be appointed by the Appointing Authority. If three arbitrators are to be appointed, then each party appoints one arbitrator and those two arbitrators together shall appoint the third one.

The arbitration rules provide for expedited proceedings. These proceedings will lead to an arbitral award on the merits, albeit in proceedings with shorter time limits. So we can make it more customized. Also, the rules include provisions on referee arbitral proceedings, but these will only be available if the place of arbitration is in the Netherlands. This can be useful if a party is in need of a provisional measure, and this will result in a binding and enforceable award.

An award issued pursuant to the P.R.I.M.E. Finance rules may be made public if both parties consent to it. But also P.R.I.M.E. Finance may publish an award or an order under the condition that no parties object to certification of the award within one month after receipt of the award.

Anyway, P.R.I.M.E. Finance is able to include in publications extracts of certificates of the arbitral awards, albeit in anonymous form.

The registration fee of P.R.I.M.E. Finance will be two thousand Euros, and there are two ways of calculating the administrative costs. The first one is an equivalent to ten percent of the arbitration fees, and the second one will be determined in accordance with the amount at stake. In any case, the administrative costs will be no less than ten thousand Euros and will not exceed sixty-six thousand four-hundred Euros. This is all regardless of the method of calculation chosen by the parties.

To conclude my presentation I would like to emphasize that the current developments indicate that there is a growing need for services like P.R.I.M.E. Finance, and I am convinced that in the future arbitration will gain more prominence and that it will become the preferred method of dispute resolution among financial institutions. We believe that P.R.I.M.E. Finance can play a significant role in this regard.

With that, I am happy to answer any questions, if there are any.

MR. ROSSELL: Valerie, question: Since January of 2012, since it started up, how many proceedings have been initiated? Do you know the volume?

MS. VERBERNE: Well, unfortunately there are no proceedings yet.

MR. ROSSELL: You are in the marketing phase?

MS. VERBERNE: Yes, we are in the marketing phase. I have to say that since February last year we get every day requests for expert opinions already. And also we get parties who will amend their arbitration clause to include P.R.I.M.E. Finance and ask our help with that. But we have not had any arbitrations yet.

MR. ROSSELL: How are the panel members selected? How does that work? How do you get on the panel of ninety experts?

MS. VERBERNE: You can go on the website and see a list of all the experts and all their resumes. And then together with P.R.I.M.E. Finance you can discuss which arbitrator would be appropriate for your proceeding.

MR. ROSSELL: But if one is interested in getting on—I'm not giving you my resume—but if one is interested in being an expert, how did you come up with the list of the ninety experts?

MS. VERBERNE: The people who have established that are always searching for new faces in the tribunal. And also some people who believe they should be in it, they can always contact P.R.I.M.E. Finance and send in their documents, and then they will decide if such people will be allowed on to the panel.

MR. ROSSELL: The list of experts strikes me as an interesting feature, which would facilitate the choice of arbitrators in the financial area.

MS. VERBERNE: Yes.

MR. ROSSELL: Because that sort of solves one issue.

Did you want to make a comment?

MS. LEONARDO: I had a quick question and a comment. You said that the Secretary General will pick the experts. Is that an expert for the proceeding in front of the tribunal, or is this a different type of expert? Could you tell us a little bit on the appointment of arbitrators?

MS. VERBERNE: Yes, if parties fail to appoint an expert or arbitrator, then P.R.I.M.E. Finance can help them by appointing an arbitrator for the panel. But I told you that those experts will have to be appointed from the arbitration list, from the panel list. But we are going to change that in a few months. In the second version of the rules you can modify the rules to allow that another expert will be appointed, but then it should be subject to P.R.I.M.E. Finance approval, and also you have to agree with the other party, if you want to appoint a member from outside the expert list.

MS. LEONARDO: There is a lot of interesting controversy about this concept of the list, and I'm just going to touch on a couple points, excluding P.R.I.M.E. Finance, because I'm not familiar with that. But for example, there is a lot of controversy between, for example, the ICC and ICDR. The ICDR in New York maintains a list. You have to qualify to get on the list, and it is not so easy to get on the list. So in the arbitral communities and circles they will refer to the list kind of in quotation marks—"are you on the list?"—et cetera.

Other institutions, for example, the ICC, don't have a list. So you pick your arbitrators in this very visceral kind of non-tangible way, kind of word-of-mouth, et cetera. But they will pick their arbitrators and you will go to that proceeding. Some of the other institutions, the SIAC in Singapore, the Hong Kong International Arbitration Commission, the HKIA, they maintain a list as well.

There are other institutions, for example, the LCIA out of London, which is the London Court of International Arbitration, they don't have a "list" per se, but they have a roster of neutrals. So upon application they'll review—I don't know if there is some sort of internal committee, but you have to be reviewed and vetted to some level—and they will put you on this "roster." They have different types of people; they have engineers or they have arbitrators.

Some of the standards are getting increasingly stringent for inclusion on certain of the lists. For example, they may do certain types of checks, and generally those checks are not people that you are friends with or you

are sitting on a panel with. They may want to interview counsel that have appeared before you during an arbitral proceeding, and ask how long was the final hearing, did you rule for or against those respective parties. So you may have to submit, for example, a respondent that appeared before you, a claimant that appeared before you, and they may require other sorts of information.

So one of the things that jumped out is if you have to go off the list. And now I hear you are amending and making it open, so upon consent of the parties if you had two parties and you agree and say, "We want to use this person but they are not on the list," I'm assuming P.R.I.M.E. Finance would be amenable if they were to approve that selection of arbitrator.

MS. VERBERNE: Yes.

MS. LEONARDO: So obviously you don't want to be mixed up with an institution holding you hostage to a list. Some of them are flexible. For example, the ICDR in New York: if you pick your people, you can certainly use the arbitrators that you are appointing. Otherwise you can go to a default list they will send out, and you have a strike: you can strike and disqualify arbitrators that you are not interested in.

And actually, they do have kind of an evaluation process of arbitrators where you can interview them. I have participated in several of these pilot programs. One was several years back where they had New York counsel, Texas counsel, and counsel in various jurisdictions, and they got you on the phone with both opposing sides present, and they interviewed you and asked you questions. They can't ask you how you would rule, but they can inquire as to your substantive knowledge and background, and that is kind of a verbal way to interview arbitrators.

What I've seen recently in the last five years is a move away from this kind of oral interview on the phone to a written set of documents where they will actually ask you to answer as to your subject matter expertise in the following areas. For example, going back to one of the construction disputes they submitted, they would ask, "Are you familiar with these type of bridges? These type of beams? This type of steel?" et cetera. It is one or two pages that may have five or ten questions. But all of the arbitrators on the short list, so to speak—it might be five or ten or so arbitrators—will answer that. That document will be disseminated to the parties. They will have more information than what's on your standard resume to enable the parties to make a more informed choice.

MR. ROSSELL: It strikes me as a creditor that, if I want to have an arbitration process that is going to be substantially similar to what I get in a court, an interviewing process would not be so great: I'd want a list to make a selection quick.

MR. WEISBURG: Completely disagree.

MR. ROSSELL: No?

MR. WEISBURG: First of all—in a big case and this is another drafting point—you absolutely do not want to have just anybody, but rather you and your adversary pick the arbitrators. And in my experience almost always, no matter how frosty your relations may be with your adversary, the adversary will agree that it's better for the parties to pick than anybody else. So in most cases, even outright warfare, I've found that the parties end up jointly picking the three arbitrators. So each picks one and they jointly pick the third. Sometimes you get down to two and you flip a coin or something like that. But at least you are not letting the institution say it is going to be Joe Smith who has got the following medical problems and whatever.

MR. ROSSELL: Well, we don't pick judges either, right?

MR. WEISBURG: It always makes sense to be the one to pick, even if you have to do it with your adversary.

Secondly, a problem with the arbitration world is the fraternity—it is largely a fraternity—and the fraternity is pretty small, so the people you really want tend to be very busy. And arbitration professionals will know who they are.

Thirdly, in my experience, which may be a little bit different than Giselle's, we pretty much always do interview the arbitrators. There is sort of a culture on how it's done. In other words, they can't say they are going to vote for me, but you can find out how busy they are, about how many other cases they have had relating to weather-related derivatives, or whatever your whacky case may be about. And the people who sit as arbitrators expect to do that. They will give you meaningful guidance. You can find a way, you know: are you a strict constructionist when it comes to contracts? Or do you really want to hear about the commercial context? Are you just a four-corners kind of guy? You can find out those things.

So again, these things may not be appropriate for a case of a million-dollar note, but they are certainly appropriate for a highly complicated case of twenty-five million dollars or a highly complicated financing transaction of two hundred fifty thousand dollars.

MS. LEONARDO: Just to pick up on that, a couple of points. Henry discussed the arbitration community being a very small circle. Indeed, it is true. There are those who know who is within whatever circle, as with any other industry. But in the international arbitration context it seems to be heightened that there is this very small group of these international arbitration practitioners, which causes them to be very busy. So the question is, do you want somebody who has a big famous name who

isn't going to get to your case for two or three years, or do you want to move along? The position is obviously we should have open minds and consider that there may be other qualified candidates who are quite capable of serving in the arbitral capacity who are not these named individuals.

One thing certainly is how busy they are: that is a huge factor in the delay of getting your ruling and moving the arbitration. If they are so busy and they can't handle your hearing, you are not going to get a hearing for two, three years on some of their calendars.

The other thing is that I would like to hope, perhaps naively, that the institutions, when they have to appoint a chair in the absence of parties being able to agree on the chair, will appoint a chair who is well versed in arbitration, who is well schooled in arbitration, who has studied, taught, lectured and educated other arbitrators, so they have some kind of notion of how to do it.

One of the problems is you may have two people agreeing, "Well, we know this lawyer from here or there, let's pick him as the chair." That is wonderful if both parties agree, and that is great. But if he or she is not well schooled in arbitration, there may be difficulties: there are things that happen and go on in a three-person panel, there are twists with disclosures and conflicts of interest; there are other things that can go on. So having someone who is skilled in the practice of being a chairman of the tribunal is very important.

Just lastly, and I don't think we have much time to touch on it, but when you speak with someone in the interview, there is this concept, "Well, this party is appointing me." So in the back of your mind as an arbitrator, if you know that you've interviewed with this party and they have appointed you, there are two things that arise.

One is the matter of continuing the ex parte communications that occurred before the constitution of the tribunal: once the tribunal is constituted, there should be absolutely no ex parte communications. When people are not skilled in the arbitration in the chair, you may or may not catch that issue, but I would caution everyone about that.

The other thing is that there is some talk in the international arbitration community that if you have a party-appointed or party-selected arbitrator, you tell the institution. They will contact the arbitrator, and that way the person is put on the panel, but they don't know which party selected them. So they know they are party-appointed, but they don't know who picked them. Whereas in the old-fashioned way certainly you know. So while Henry is correct—you can't ask are you going to rule for or against me—but if you know this person hired me and is paying my bill, there are those kind of questions. It is my experience that, with sophisticated arbitrators, whether they are party-appointed, institutionally appointed or parties selected by blind screening, they tend to be impartial and fair and neutral.

MR. WEISBURG: Just one little off-the-wall idea to deal with this fraternity. One thing that people rarely think of, but I've had some very good success with, is that the arbitrators don't always have to be lawyers. Again, it is going to be the unusual case, but I have one case of mine in particular, which was a case arising with a Latin American corporation, where we were much more interested in having someone familiar with how the oil business worked in Latin American than having a lawyer. So we picked a retired controller who spent a lot of time in his career in Latin America for a major oil company. So you can expand. The fraternity is all lawyers. In the right case, again if you have a dispute over a weather derivative, that might be a case where you may want a derivative trader as opposed to the lawyer. So you can expand that community to some extent.

MR. ROSSELL: I think we are being told we are ending our panel here.

MICHAEL GALLIGAN: Just two very quick points. We didn't talk very much about the place where you have the arbitration, but I just wanted everyone in the room to know that later on in the summer we expect to see the opening of the New York International Arbitration Center, which will provide a neutral site and space here in New York City for the holding of arbitrations, and hopefully we will do a lot of other good things for the promotion of international arbitration here in New York City. The International Section was a moving force in this. That is a story for another time. But this evening, actually, is a reception at Paul Weiss at which the opening of the Center will be announced, and many of you have probably gotten some sort of word about that.

The other thing, indeed there is another convention drafted and now signed by many countries but only ratified by one country so far, which does try to do for choice of courts, as opposed to choice of arbitration, what the New York Convention does for choice of arbitration enforcement of awards, the Hague Convention does on the choice of courts. The International Section has put a lot of effort into working with the State Department on U.S. implementation legislation and trying to move the ratification through. We actually thought there was a possibility something might happen in the last Congress. We are hoping for better chances with the new Congress. The Administration is very much in favor of it. In fact, I think later on this week Andrew Otis, our Chair, is making a presentation to the Executive Committee of the New York State Bar Association to try to make this a legislative priority of NYSBA.

MR. PIEPER: Well, thank you very much. On that happy note, I think we have concluded this panel.

III. Out of Bounds: Ethical Considerations for Lawyers Operating Outside Their Home Jurisdiction

MR. PIEPER: Ladies and gentlemen, we are going to resume our proceedings. We have come to the third and last of our panels this morning. This is the annual Baker Hostetler ethics lecture. I will introduce to you a man who doesn't need any introduction, Gerry Ferguson. You know him well. He is going to take you through ethical issues in international transactions. Right after that we will have our luncheon, and it is set up right next door.

I will now hand it over to Gerry. Thank you.

GERALD J. FERGUSON: Thank you, Thomas. I wasn't sure how you were going to end "the man who doesn't need…" I was afraid you were going to say the man who doesn't need ethics. Not true.

The theme that you have been hearing in the presentation today is that, when you enter into international business, you need to leave your own cultural assumptions at the door, and make sure that you understand the big picture: How someone from another culture is approaching the problems that you are approaching. This is particularly critical in the area of ethics and professional responsibilities, because conceptions that New York lawyers may take for granted in term of what it means to practice law, what sort of conversations are privileged, who is a lawyer—they may not be true or may not be interpreted the same way in the international context.

To start our discussion today we have my partner, Gonzalo Zeballos, who is currently involved in the Madoff investigations at Baker Hostetler, is responsible for our international investigations, and coordinates our international litigation. Prior to that, he was counsel at AIG, where he was responsible for supervising international arbitration and litigation. So he has very much firsthand experience of what we are talking about today.

Without further introduction, I'll turn it over to Gonzalo.

GONZALO S. ZEBALLOS: Thank you.

So whenever the issue of foreign attorney-client privilege comes up, I usually get one of two responses. The first one is, "Who cares? It doesn't apply to me, and it's privileged anyway, so what's the big deal?" That is the response I get when everything is fine. The other response I get when everything has gone wrong is: "What do you mean these communications aren't privileged?"

That is not how it works. What do I do? And in that context people are almost always imposing the United States concept of how the attorney-client privilege works on foreign proceedings.

So why does it matter? Why should we care? The answer is that we live in an era of increasingly complex multinational transactions. It is becoming more and more popular to see commercial transactions that touch multiple foreign jurisdictions. You could argue that these transactions really are not anything new, and you would be right. But what is new is the speed and ease at which multinational transactions take place.

We live in an era where huge sums of money can be moved across national borders with the click of a mouse. We have recently seen the massive global impact with various fraudsters, most recently with the LIBOR scandal and Madoff, BCCI, Arthur Andersen and other big examples. Individual employees, traders, brokers, stock people—these are folks that, acting alone, can bring major companies to their knees in a matter of days.

It is really not just the scandals and crises that one needs to look out for. The risk is really there in every commercial transaction. Nobody wants or expects litigation when you are closing a transaction, but it happens. When you are negotiating and preparing a transaction, it's really necessary to make sure that you take all the steps you need to take to make sure that you protect the attorney-client privilege. In fact you are professionally obligated to do so. New York Disciplinary Rule 4101 requires you to protect and preserve the confidences and secrets of a client, and you really can't do that unless you understand how things work abroad.

What we are going to discuss today is how the attorney-client privilege is treated in foreign jurisdictions and how it is recognized and implemented here, when U.S. courts are required to apply the foreign privilege and decide which law will apply to a dispute or request for production of documents. What is important to know is that different countries interpret the attorney-client privilege in vastly different ways. It really matters whether you are in the private practice or an in-house lawyer. It matters if you are acting as a lawyer or acting as a business person, and it very much matters where you are.

In cases involving multinational disputes, U.S. courts are routinely faced with the question of precisely which law to apply to the action. The applicability of the attorney-client privilege is a question of law that falls squarely into a trial judge's domain. This is a critical question for the trial practitioner, because not all jurisdictions recognize the existence of a privilege or extend that privilege to in-house counsel.

In most civil law jurisdictions the privilege is recognized as the professional secret, which protects the attorney from having to give testimony, but it is not a privilege per se. Most civil law jurisdictions don't recog-

nize the attorney-client privilege as existing between the in-house counsel and the client. And this is because of the perceived lack of independence of the in-house lawyer. Accordingly, it matters which law applies.

The generally accepted formulation of the attorney-client privilege in the Southern District of New York is as follows: Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his or her instance permanently protected from disclosure by him or herself or by the legal adviser until the protection is waived. We are all familiar with that standard.

The central purpose of this privilege is to encourage full and frank discussions between attorneys and their clients. But there is a very, very important point to focus on here, and that is that disclosure is permanently protected. It is an absolute privilege. And as you will see in a few minutes, this aspect of the U.S. rule forms a very important part of how U.S. courts will analyze the protections afforded under foreign law.

But before going into how a court chooses the applicable law, I'm going to pause for a minute to discuss how evidence of foreign law is adduced in U.S. courts, because the distinction between questions of law and questions of fact really is important in this area of law. In contrast with much of the rest of the world, under Rule 44.1 of the Federal Rules, issues of foreign law, questions of foreign law, are issues of law and not fact. What this means in practice is that, although the parties should introduce evidence of foreign law to support their case, the court may—and this doesn't mean that it will do so, but it may—on its own research issues of foreign law and come to a conclusion that hasn't been advanced by the parties. Sometimes this can result in the rejection of an unrebutted position. This also means that on appeal issues of foreign law remain open for reargument.

The parties seeking to invoke the protection of the U.S. attorney-client privilege, regardless of whether it is being applied under the U.S. or foreign standard, bears the burden of establishing those facts that establish the basis of a privileged relationship. In other words, showing that an attorney-client privilege exists as a matter of law in a jurisdiction isn't enough. You have to show that the communications at issue are of the type to which the privilege applies. And this is the case, as I said, whether you are applying the U.S. standard or a foreign one.

Rule 501 of the Federal Rules of Evidence provides that questions of privilege, in other words the fact that a privilege applies as opposed to whether it exists as a matter of law, are governed by principles of common law as they are interpreted by U.S. courts in light of reason and experience.

To determine the legal framework against which to apply those facts, the courts have to decide which law applies. In practice what this means is that courts look to well-established principles of comity. In assessing the potential availability of foreign privilege law governing communications between foreign lawyers and clients, most courts have engaged in the traditional choice of law context analysis and looked to things such as whether the client is foreign or domestic, whether the foreign legal representative was working on foreign legal matters or legal matters with a direct U.S. component; this is known as the touch-base standard, which has been summarized as follows: any communications touching base with the U.S. will be governed by the federal discovery rules, while any communications relating to matters solely involving a foreign country will be governed by the applicable foreign statutes. So what this advances is actually a very strong prejudice in favor of applying the U.S. discovery rules, as long as you can find a nexus to the U.S. But it really has to be a nexus to a U.S. legal issue.

So what are the touching base factors? U.S. courts will generally defer to the jurisdiction that has the predominant or most direct or most compelling interests in whether those communications should remain confidential—unless the foreign law is contrary to the public policy of this forum. And this is an important exception, because the U.S. courts ascribe tremendous significance to the attorney-client privilege and the policies underlying it. The most simple application of this rule would be in a foreign proceeding when a foreign attorney represents a foreign client: the U.S. court is almost always going to apply foreign law, because that would be consistent with the expectations of all the parties. To the extent there is no attorney-client privilege in that jurisdiction, no privilege is going to apply to those communications, and they will most likely be held to be discoverable. And I say most likely, because the test for discoverability is a little bit more complicated than that.

If the matter is in a U.S. court, it will be rare that the example I just gave you will ever be the case. And the test will then be the touching base standard that I just described to you.

Communications undertaken in connection with U.S. legal proceedings—and it is not just litigation but things like patent applications—will likely be held to touch base with the United States, and the U.S. rule governing the attorney-client privilege is likely to be upheld in that context. But the questions can get a little bit more muddled when you have parallel legal proceedings or investigations. There the parties may have to demonstrate through fact evidence the applicability of the U.S. privilege to communications. Having a U.S. lawyer participate in those communications will help establish that nexus to the U.S., but standing alone it is not going to be enough to establish the requisite nexus.

But even where the relevant legal communications take place abroad, among foreign lawyer and foreign client, courts will look to more than just the question of whether the attorney-client privilege exists. And that question goes to discoverability, which is the point I was making a few minutes ago.

Where a jurisdiction doesn't recognize the existence of an absolute privilege—but it does have an absolute or near absolute bar in discoverability—the court may look not just into the foreign law, but the policy underlying that law as well. An example of this is the *Astra Aktiebolag v. Andrx Pharmaceuticals* case. In that case the Southern District declined to order the discovery of attorney-client communications, even though in Korea there was no absolute privilege protecting those discussions. The court did that because it recognized that Korea was a jurisdiction where the local jurisprudence hasn't developed an attorney-client privilege because there was simply no way for the communications between a lawyer and his client to be discoverable. So the court was troubled by a situation where documents would be discoverable in the U.S. through the application of Korean law, even though those documents would never be discoverable in Korea. And the court ruled that, applying Korean law, it would not order discovery of those documents.

I should point out that this is a very controversial decision, because choice of law rules normally dictate that you apply a balancing test to determine the applicable substantive law. But when you are applying procedural law you apply the law of a forum. So the question of whether or not a privilege exists is pretty universally held in the case law to be a substantive question of law. But the issue of discoverability and discovery is widely held to be a procedural issue of law. So under that analysis it does seem that *Astra* case was wrongly decided. So I would hesitate to rely on that case if this issue arises.

So whether you are negotiating a transaction or engaged in litigation, you really have to determine whether and how the attorney-client privilege applies in the local jurisdiction.

Another important point to note as well is the risk of waiver. If you are in a jurisdiction that doesn't recognize the attorney-client privilege and you produce documents relevant in response to an investigation or a regulatory investigation or a criminal investigation, even if there is no basis to resist the production of those documents in that jurisdiction, and a party then seeks discovery of those documents in the U.S., you will have waived the attorney-client privilege even if the touching base standard would have otherwise been satisfied and the U.S. attorney-client privilege would have applied to those documents.

AUDIENCE MEMBER: What's your alternative?

MR. ZEBALLOS: You don't really have one, but you need to be aware of what's going on if this happens to you.

AUDIENCE MEMBER: If I could just add one other point to that. There is a European case, I think it is the AM&M if I'm remembering correctly, but that very situation occurred. The local authorities were able to get access to the documents, and once they had access to the documents at the government level, our government made a request under an information-sharing protocol, and they came in that way. So there are many, many ways you can vitiate the privilege or the obligation of professional secrecy. It doesn't always have to be through discovery.

MR. FERGUSON: So what we are really talking about in the context of a transaction is being conscious of what documents you are creating in the first place.

MR. ZEBALLOS: Right. And where they go. And it also goes to the point of whether you resist, whether you advise your client to resist on that production on the basis of privilege. So even if you are abroad, and the foreign privilege isn't being recognized—to answer your question maybe a bit better—maybe what you do is try to resist production and try to enforce the privilege, and that may at least give you an argument. But the other side of that is that, if you are going to lose, it might put you in a better situation of just discreetly producing the documents here, rather than having a big fight about it that just draws more and more attention to the fact that you are going to have to produce these documents anyway—and it adds costs to your litigation.

Under U.S. law the party seeking to avoid discovery has the burden of showing that the foreign statute or law bars production. It should be noted that, even if the act of production may violate a foreign statute, such as a privacy rule or any other privilege or foreign privilege or secret, production can still be compelled.

To determine whether discovery will be ordered in this context, the courts typically apply a five-part balancing test that has been derived from Third Restatement of Foreign Relations Law. I'll run through this quickly, because I am running out of time. These elements are: the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternate means of securing the same information, and the extent to which noncompliance would undermine important interests of the United States or compliance would undermine important interests of the state where the information is located.

Now, in my experience the balancing test is fine, and it's quite well articulated in the law, and your briefs can and should address this. But courts, particularly in this jurisdiction, like to order discovery and like their discovery requests to be complied with, as long as they are reason-

able. Where you fall into this trap—if you want to call it a trap—is when you are using discovery to leverage a settlement or to put pressure on a defendant. Courts really don't like that. So if your discovery is clearly aimed at putting your defendant or the other party between a rock and a hard place, and what upon discovery will reveal is that every category of documents you request involves privacy issue or some kind of professional secret or bank secrecy—you are playing your hand pretty obviously. So you have to be discreet and thoughtful on document requests when you are making them abroad.

Lastly, I would like to speak very quickly about the *Malletier* decision. The *Malletier* decision is a relatively recent decision in the Southern District which held that communications in the United States in a dispute that was governed by U.S. law involving in-house counsel—French in-house counsel who were working in New York—weren't privileged. The court analyzed this under both U.S. and French law. The French law analysis was easy, because in-house counsel communications aren't protected under French law. And that is because under French law you can't be a salaried employee and be a member of the bar, because it's found that that vitiates your independence. So the analysis there is very simple.

But what's curious about this case is that you have somebody acting as a lawyer in the U.S. giving legal advice to a client. And we all know that the attorney-client privilege can exist as long as the perception of an attorney-client privilege exists on the part of a client. But what the court held here is that in order for the privilege to exist, a prima facie requirement for it is that one of the parties at least has to be admitted to the bar, has to be admitted, has to be a practicing lawyer. And because French in-house lawyers are not practicing lawyers, the court held that there could be no "functional equivalency" to how an in-house lawyer functions in the United States and that how those communications all had to be disclosed.

I'll wrap it up with this thought. One of the comments I got when I pointed this out was, "Well, if you are relying on a French jurist for legal advice in New York litigation, you've really got much bigger problems."

But the reality is you could see how this could arise. If you have a French contract, if you have a contract that is governed by French law and the dispute is in New York—this happens all the time—and you happen to have in-house lawyers in France in your New York corporate headquarters, why wouldn't you go to your jurist and say, "Hey, are we going to win this case?" The problem is if your jurist writes back to you and says, "We are dead; French law is terrible, and we are going to lose this case." That is now discoverable, and you've just lost your case. And you've arguably breached your ethical responsibility as a New York lawyer to preserve your client's privileges, because you never should have let that question get asked.

With that I'm going to hand it over to Marco, who is going to talk a little about European law.

MR. FERGUSON: I'll just introduce Marco. Marco has both a doctorate of law in Italy and an LLM from Harvard in the United States. He practices in both corporate transactional and litigation with his own firm, located just outside of Milan.

And I'll use this as an opportunity to plug. Marco is the Chair of our Milan chapter for the International Section. We have chapters all over the world. The Milan chapter is going to be having a regional meeting of European chapters in March of this year. There is information on the table as you exit. It's going to be an amazing event with real leaders from the fashion industry, with both the New York and Milan and the Italian bar participating. I urge you all to consider that if that is of interest to you.

MARCO AMORESE: Thank you, Gerry, for being so kind. I feel privileged to be here.

I have a difficult task. First of all, after Gonzalo's briefing presentation has set such a high standard, following it is very hard. But aside from that, I have ten minutes, and I have to give an overview of the European perspective. Obviously, as you know, the European perspective is quite difficult to give, as we have very different legal traditions and jurisdictions. But again, I will try, and I will try to highlight what I think are the major differences between the U.S. and Europe.

So I want you to bear in mind that from the European standpoint you have to distinguish between the confidentiality of the information disclosed by clients and confidentiality during negotiation—the confidential information disclosed and shared by the negotiating party, especially the negotiating lawyer.

So Europe has tried to draft a summary of what are the core principles of legal practice among European jurisdictions. The Council of Bars and Law Societies of Europe has drafted a Chapter of Core Principles, and obviously confidentiality is considered one of the basic foundations of legal practice. It is considered both a duty of the lawyer and a human right of the client, so it is considered a strong principle.

Gonzalo touched upon this issue generally in continental Europe, where we usually refer to professional secrecy—that secrecy that derives from the information that has been given during your presentation with your client. But again, even the confidentiality between an attorney and his client is not absolute. There are general principles around Europe.

First of all, there is a duty to avoid imminent death. That is the case where you are talking with your clients, you tell him, "Look, the other party is a tough negotiator and they are not going to give in to these conditions." And he answers, "Well, we have to loosen him up." And if you know that they are loading a magnum .44, you have the responsibility to warn the other parties. This is a principle that never really happens.

But what is more interesting probably is the conflict between the money laundering provisions and professional secrecy. Because under the European directives that are being enacted in most of the European jurisdictions, lawyers have the duty to report cases where there is a suspicion of money laundering. The distinction is pretty shady, because obviously lawyers do not have to report cases where they are asked to assess the situation by a client. So the client goes to a lawyer and says, "Look, I have this situation, is there any risk about money laundering legislation?" Obviously, in that case there is a confidentiality duty. But if during the negotiation there is a suspicion of money laundering, lawyers have to report, and they don't have to say anything to their client. Actually they are in breach if they say something to their client. So this is a very important exception.

So the other aspect that I wanted to stress is confidentiality during negotiation. Because in most jurisdictions in Europe there is a duty of confidentiality for information that lawyers share during negotiation. Usually that is based on an agreement that is set at the beginning of the negotiation. But even if there is no agreement, there are ethical obligations not to disclose that information that is considered immensely privileged.

So the rules vary across Europe. Usually there are jurisdictions that require a lawyer to specify that the communication that is given to the other lawyer is meant to be privileged, so it cannot be disclosed. But the problem arises, as I said before, in Europe there are many jurisdictions and not all of them recognize this principle. So the Council of Bar and Law Societies of Europe have found a balance between these different habits. The principle is that, if the communication is meant to be privileged, but the receiving lawyer lives in a jurisdiction that doesn't recognize such a principle, he has to return immediately such correspondence and has to specify that his jurisdiction doesn't recognize that principle. Obviously, that is an odd situation that everybody should avoid, so it is often the case that parties define the scope of confidentiality at the beginning of their negotiation.

MR. FERGUSON: Perfect.

Next we are going to be hearing from Derek Jones, who is going to give us a perspective from Caribbean jurisdictions on some of these issues that we have been talking about.

Derek is admitted to practice in Cayman Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. He is also a solicitor in the U.K. I think if you want to meet with Derek, let's try to meet in one of his Caribbean offices, rather than the U.K. office.

He has the rare distinction of being recognized by Chambers as a leading authority in commercial law both in Jamaica and in the Caymans.

DEREK JONES: Good afternoon, ladies and gentlemen.

First of all, I would like to say thanks for the invitation to be here. To Baker Hostetler many thanks. And to the New York State Bar for the privilege of being here with you today.

I'm not sure why all the speakers have decided not to stand, but in my case it is very simple. When I was in high school my mathematics teacher accused me of sitting on my brains. So I decided whenever I would speak, I would make certain they are adequately ventilated.

It is my pleasure to tell you a bit about the Cayman Islands so to set the stage for what I can share with you on this interesting topic. There are three islands: Grand Cayman, Little Cayman and Cayman Brac, together about a hundred square miles. But the island upon which we stand today is called Manhattan, just about one third of that in size. The name Manhattan is derived from an early American Indian word called Manahachtanienk, which means the place where we all got drunk. It is an apparent reference to the Dutch settlers plying the native inhabitants with booze, or whatever the Dutch call it.

By contrast, Columbus called the Cayman Islands Los Tortugas because of the number of turtles he saw. But Sir Francis Drake eventually prevailed when he named them the Caymans, after a local species of alligator. The famous pirate Black Beard is reputed to have spent some time there.

The Cayman Islands are a fabulous tourist destination, made the more so by the temperature today in Manahachtanienk. When I got here this morning to register the lady told me that the meeting was in the Sun Room South, and I said you have got to be kidding me!

Anyway, with the passage of time Manhattan is no longer famous for people getting drunk, and the Cayman Islands are no longer famous for turtles or alligators for that matter. They are much maligned because they have been anointed as the money laundering capital of the world, which is a gross untruth.

I want to play a children's game with you. This is the game of associating objects and places in which we tell a child to pick the object or the place that does not fit. For example, knife, fork, spoon, cup, automobile. The answer is obvious. So let's try another one. London,

Tokyo, New York, Singapore, Cayman. Your first guess is wrong. Cayman does in fact belong in that company. It is the fifth largest banking center in the world and very much belongs in the league of cities that I named to you. It is a former colony of Britain and today is classified as a British overseas territory, which in essence means there is internal self-government, subject to top level supervision by a British Governor, and the Brits are also responsible for our defense. So don't even think about attacking us, because the ghosts of Sir France Drake, and Lord Horatio Nelson, not to mention Black Beard, will rise up against you, together with Her Majesty's Navy.

So what will you find there? Firstly, almost as high a concentration of lawyers as in New York. Plus foreign managers, accountants, investment specialists, money managers and the like. To be a financial center you of course need to have banks, and in the Cayman Islands there are several hundred registered banks. These range from full service retainer banks, like HSBC and Scotia Bank and Royal Bank, through the private merchant banks like Cooks and Credit Suisse, and also the big international banks, like the Bank of China, which has offices there.

Each of the big four accounting firms—used to be eight, but now four—has a significance presence, the largest with a staff of close to two hundred people living and working there.

Another key element of a financial center is its legal system. And this is a special haven for tax reasons in most cases; the entity sitting at the top of many structures is a tax-exempt Cayman company. Those structures often include companies and entities in different parts of the world and in very different jurisdictions. But when there is trouble in the chain down below, it is to Cayman that the litigation is driven, as that is where the winding up of the ultimate parent company often takes place.

We have a very good legal system, with strong and accomplished judges, supported by a sophisticated infrastructure that works very well. Most of our law we inherited from the British, and there has been some local jurisprudence as well. The final Court of Appeal is the Judicial Committee of the Privy Council in London. So I want you to know that this is a serious place, not just sand, sea and stingrays.

Given the standards that come along with those activities I can assure you that, whatever it is, it is not the money laundering capital of the world. Opening a bank account there is not an easy thing. But for those in legitimate business, the rigors of KYC and due diligence are not hard to endure.

This is a highly regulated jurisdiction, and I like to think that our Cayman Islands Monetary Authority is among the best in the world. The consequence of this is that complex commercial disputes are regular fare in our courts, and the application of foreign law is commonplace.

By way of example, I was recently involved in a series of transactions where there were a Dutch company with Swedish and Delaware subsidiaries, a Mauritius holding company, and a Cayman parent manned by U.S. directors, all the ingredients for trouble. So the rules of ethical conduct and also the rules of privilege are often tested and explored in our courts.

When you are involved in transactions that involve foreign law and foreign funds, it is crucial that you get yourself good foreign counsel, as the rules in that foreign jurisdiction may well differ from those to which you are accustomed. Depending on where litigation ensues, the rules which apply may prove to be a pleasant or unpleasant surprise.

So what are the rules that affect ethical conduct and discovery that you will find in Cayman? Time obviously does not permit a full evaluation, but as the purpose of the session is to inform and to hopefully provide practical takeaway guidance, I will identify some of the issues and concepts with which we contend.

I will start by saying that in my view privilege is regarded as an exception to the law of evidence. The law of evidence is that all relevant material ought to be available for a tribunal. But if there are privileged documents, they are excluded. In some jurisdictions this is a matter of procedural law, and in some it is a matter of substantive law. You may wish to think about which one it is in your own jurisdiction. For us legal professionals, privilege is a manifestation of the principle protecting confidentiality, which is at the heart of these relationships.

Although it is historically an aspect of the common law of evidence, it has also been described in more recent case law as a fundamental human right. This latter trend is of course consistent with the letter and spirit of the European Convention on Human Rights.

Legal privilege has for us two aspects: Legal advice privilege and litigation privilege. Legal advice privilege essentially protects confidential communications between a lawyer and his client which come about because a client wants legal advice in an appropriate setting. You should note, however, that the privilege does not extend beyond the lawyer and the client, so communications with third parties will usually not be privileged. Then we recognize litigation privilege, which protects confidential communications and evidence of those communications between a lawyer and his client and/or a third party or between a client and a third party, provided that such communications have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation or litigation that is reasonably in prospect.

The privilege covers all members of the legal profession: barristers: solicitors and attorneys, as the case may be.

I pause to tell you that I was originally admitted to practice as a solicitor. It came as quite a shock to me the first time I came to the United States and saw a sign that said no dogs or solicitors allowed.

It was not entirely clear to me into which category I fell. And I was particularly mystified by how they knew I was coming.

It applies equally to foreign lawyers, provided the relationship of lawyer and client exists between them. And finally in-house lawyers, a phrase I do not like because that makes me an out-house lawyer. But finally in-house lawyers have the same privilege in England as by extension the Cayman Islands. So if you end up advising clients on employment contracts, it is important the obligation under the contract is to advise all the companies in the group, not just the parent, because you never can tell where the trouble is going to come about. We proceed on the basis that what matters is not the lawyer's job title, but whether he is exercising professional skill as a lawyer. We take it that privilege belongs to the client. The rule is established for the client's benefit and can be waived by the client.

Foreign courts have their own rules on privilege and disclosure. Of course it is the view from the court you are in which dictates what is foreign. If you are in an American court, Cayman will be the foreigner. If you are in the Cayman court, then the view of course is quite different. So you may find that documents privileged under English law may not necessarily be privileged in foreign court and vice versa. However, if a request is made by a foreign court for documents in England or the Cayman Islands, where a third party is asked to disclose documents, the recipient of the request will be entitled to claim legal privilege.

So this, ladies and gentlemen, is a quick summary of the approach you can expect to find in the Cayman Islands. So I end as I began, when dealing with matters that involve a foreign jurisdiction, make no assumptions about how these matters are treated. Get yourself good foreign counsel and have them guide you. Modesty of course prevents me from suggesting whom you might seek to retain in the Cayman Islands.

MR. FERGUSON: Thank you, Derek.

To conclude our presentation, Christian Hammerl is going to give us a broader perspective of what it means to be a practitioner involved in a transnational transaction, particularly where the practitioner has multiple admissions. And Christian is particularly qualified to speak on this topic, because he is currently with Wolf Theiss, a large three-hundred-plus-attorney firm primarily in central and eastern Europe, where he is acting as outside counsel for U.S. firms. He previously worked for a Taiwanese computer company as their chief legal counsel for foreign transactions.

He is admitted in Austria, New York, California and as a solicitor in England and Wales. He also serves as our chapter chair for Austria. So when you are in Austria, be sure to call on Christian.

CHRISTIAN HAMMERL: Thanks, Gerry, for the introduction. I am delighted to be here to bore you death, because I understand that is a requirement for ethics lectures.

They have to be boring and also rambling and taught by a semi-retired lawyer, so I think we are halfway there. I hope to fulfill the rest of the promise.

What I am going to talk about is the dilemma of the lawyer as a negotiator, the real or perceived conflict between the duty to provide advocacy and the duty of honesty in dealing with other parties. And I look at that not in the context of a courtroom setting, although there is the duty of candor, but in the context of a transactional and negotiating setting.

To do so I think we need to take four steps. First we need to look at what law is applicable. There is a specific conflict of laws, and this is also true for professional rules of conduct. The conflict may be exacerbated by the applicability of foreign rules of professional conduct. We need to look at what substantive laws or what substantive rules of conduct are applicable to practitioners admitted here and in a foreign jurisdiction. And lastly, we will try to put this all in context by looking at truthfulness in statements to others in negotiation settings.

I think it is fairly easy to get a grasp of what the jurisdictional issues are, what the choice of law issues are if you consider the following. There are basically two types of lawyers and two types of jurisdictions and all the possible combinations thereof. The first group of lawyers are those admitted only in one jurisdiction, and what is relevant here is that they are practicing on an incidental basis in matters where no *pro hac vice* admission is possible outside their home jurisdiction.

I certainly am not going to lecture you on multistate practice in the U.S., because we are here in the tri-state area. Most of you will be admitted also in New Jersey and also in Connecticut, and, if not, then you will regularly handle transactional matters reasonably related to a matter that you are handling legitimately in the jurisdiction of your primary litigation. So I don't have to talk about fee pay or registration requirements in other U.S. jurisdictions. Where I think my expertise is more helpful is to talk about how compliance with foreign professional rules of conduct that may complicate the situation.

So if we go back to the groups of lawyers we have, I think it is more interesting to look at lawyers admitted in two jurisdictions, and the response to that review by the jurisdictions in which they are admitted can be twofold. Finally, jurisdiction one and jurisdiction two ignore the fact that the lawyer is admitted in another jurisdiction and leave it to the individual to settle those conflicts. That is unfortunately the case today with respect to lawyers admitted in a member state of the European Union and in a jurisdiction of the U.S., and also if the European lawyer is admitted somewhere for that matter—maybe Algeria or Israel.

Then, second, there are jurisdictions that to some degree take into account that the lawyer may have obligations of a professional nature also in another jurisdiction. And for lawyers practicing in New York the New York Rules of Professional Conduct apply, and here Rule 8.5 is the controlling authority. Talking only about transaction methods, New York is remarkably flexible in that, if the lawyer has his principal office in a different jurisdiction than where he is admitted, then those rules control. No rule without exception: If the effect of the conduct of a lawyer materializes predominantly in the other jurisdiction, then that will apply.

In the European Union there is also a system of reciprocity to a certain degree for lawyers admitted in more than one EU member state. There are two directives: The directive of 1977 and the directive of 1998. Both of them regulate some form of practice of a lawyer in another European member state. The older one simply on a talk basis, the other one with the purpose of setting up shop in another European member state. Both of them expect a lawyer to comply not only with the rules of professional conduct in the original jurisdiction of admission but also in the host jurisdiction.

Foreign transactions have a way of getting messy very quickly. The foreign or dual-qualified lawyer, particularly if he has superior language skills, is the only one who is able to read the train schedule, get subway tickets and things like that. And the more exotic the jurisdiction, the more likely it is that the client is going to cling to the lawyer for all sorts of matters: accounting services, real estate brokerage and referral of local employees.

As far as New York lawyers go, there is really the temptation to treat the lawyer as a factotum. As far as New York lawyers are concerned, it is permissible under Rule 5.7, under certain circumstances, word appropriate disclosures and consent by the client, pursuant to Rules 1.7(a) and 1.8(a) to perform such types of services.

Foreign jurisdictions may take a different view. They may take the view that the lawyer is always a lawyer, and so you just may get into the crosshairs of Rule 5.5, that you are engaging in an unauthorized legal practice abroad, and that is again subject to discipline in the New York rules. Also, we have heard the issues about client privilege and so forth.

So coming back to the second step that I described in my introduction, we need to understand the core rules or the core obligations of lawyers vis-à-vis clients and third parties. For that reason there needs to be a selective comparison about duties applicable first vis-à-vis clients and then vis-à-vis third parties for New York lawyers and lawyers in Austria.

Not that I intend to lecture you, as qualified and experienced practitioners in New York State, about what obligations you have towards your clients. As you will see, I think you could choose any state, any country in the western hemisphere, and the picture that emerges with respect to obligations to its clients will always be the same. The client is entitled to the services of a competent, diligent and zealous advocate who does the utmost to protect the confidence of his client. And while a lawyer must not counsel a client who assists with the commission of a crime, if in the course of a representation prior criminal conduct is revealed or various courses of actions are discussed that may expose the client in terms of criminal sanctions, this does not touch the obligation of confidentiality of the client.

Now, a quick look at the situation in Austria. First, we should note that Austrian lawyers are not officers of the court, but the preservation of the dignity, of the honor, of the legal profession is almost as important a policy goal as the preservation of the interests of the client. I leave it to you to read Section 9 of the Legal Professionals Code, the RAO. But what is interesting, I think, is the emphasis that the lawyer is required to use, without reservation or fear, arguments which are in furtherance of the client's interests.

Let's now quickly turn to the situation applicable to transactional settings—the duties towards third parties. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealing with others. This is how the introduction of the ABA model rules frames the dilemma of the lawyer as a negotiator. In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person. So this may affect the ability of a lawyer to render assistance to a client. To borrow from Judge Cardozo: If the morals of the marketplace that are common in a workaday world dictate the norms that are permissible for a lone lawyer in negotiations, then the lawyer may in fact have trouble explaining why he is unable to secure the best bargain.

However, it is recognized that negotiations have their own type of hermeneutics, if you will, and that also the rules governing what is permissible within a negotiation must be construed within these hermeneutics of the negotiation.

It is useful to look at Formal Opinion 6439 of the ABA Standing Committee on Ethics and Professional Responsibility for guidance on this matter. For one thing, it is acknowledged that parties are not entirely forthcoming, and that is sort of accepted by everybody when they enter negotiations. For another, it carves out certain types of conduct that are not deemed to be in violation of the rules. First is the so-called puffery, or embellishment and posturing situation, where simply as a matter of introductory statements for legal positions, these statements are not taken as statements of fact. What you have to ask yourself if you are in negotiations is the following: "What the type of statements that I am delivering are to be expected to be taken as a statement of fact by the other side, or is this something within the usual give and take?"

Also, liability attaches only to statements of fact, not to mere opinions of lawyers. And in many instances lawyers sometimes communicate opinion with too much assertiveness as being a statement of fact, but it is in fact their own opinion or just a mere assessment. So certainly there is a danger for lawyers to become enmeshed in their clients' affairs way too much, and this is typically something like too much information.

Lastly, non-disclosure. Lawyers do not have an obligation to speak in transactional settings, absent special conditions.

If you look to Europe, you will not find an exact counterpart to Rule 4.1. Austrian lawyers, and European lawyers in general, will have to be guided here by the general principles of ethical behavior and behavior consistent with good standing and the requirements of the bar associations.

Also, you should take into account that there is a second set of rules that may bring you into trouble in Europe—particularly when you may be perfectly fine as far as professional conduct is concerned. Thus, there still are rules about pre-contractual disclosure which can lead to exposure to damage claims in cases after the transaction has closed.

So what is the consequence of all of this? What is the takeaway? I think disclosure, disclosure, disclosure is one piece of advice I would give you. Plan ahead what your transaction is going to look like, and don't get caught up in a situation where the circumstances where other parties dictate the parameters of your exposure in terms of professional liability.

Also, sometimes it is necessary to fight sticks with sticks and knives with knives. Really, if you foresee that this may be a troubling set of circumstances, then it may be better to associate with a lawyer only admitted in a foreign jurisdiction, so that it is absolutely clear what kind of professional rules this lawyer has to comply with.

Thank you very much, and I hope I did not bore you too much.

MR. FERGUSON: So I want to thank our panel.

We have a little bit of time for questions at this point.

Mr. Galligan.

MR. GALLIGAN: Two questions for Marco. First of all, the sets of rules you were talking about, those are advisory rules?

MR. AMORESE: Those are a summary of the fundamental rules that are similarly enforced in the member states.

MR. GALLIGAN: But they are not European directives.

MR. AMORESE: No. CCBE has summarized those principles that are recognized in all Europe.

MR. GALLIGAN: Okay, so now I would like to focus a little on the money laundering.

MR. HAMMERL: Can I add one thing about the CCBE, because I think there is perhaps a different treatment in various jurisdictions. The Austrian system works where there is a statute, the legal professionals code, so what is there is not only binding for lawyers but also on authorities. Which is important because the lawyer has a right to have an executive committee of the bar present if his office is searched. So it's useful.

And then there are rules adopted by the plenary session of the bar, and there we have now very recently had an amendment that the CCBE rules are mandatory on the same level as the Austrian, only for outbound transactions to other jurisdictions. So maybe this is different.

MR. AMORESE: If you go on the website there is my presentation, and there is actually a chart that sets out for each state the powers of enforcement. For example, in Italy those rules have been enforced in the code of ethics for the Italian lawyers.

MR. GALLIGAN: So let me ask you to focus a little bit on the exceptions to the rule of confidentiality and privilege in regard to money laundering. Because it seems to me that that is a big difference between the European approach and the U.S. approach. Especially since the concept of money laundering seems to be more and more to embrace tax issues, tax evasion, and so forth.

AUDIENCE MEMBER: Terrorism.

MR. GALLIGAN: Right, but I'm thinking in terms of transactions. Perhaps even more of an issue for those of us who are on the tax side and offer private client advice and so forth is the fact that tax issues seem to be a big exception and more and more are being encompassed with

anti-terrorism and anti-money laundering in the more narrow sense of the term. For instance, in England you have the Proceeds of Crime Act, so that, in my understanding, if a British solicitor or attorney knows his client is not going to file a return or make a payment, he may have an obligation to disclose that to the tax authorities.

MR. JONES: We have that in Cayman as well. We have to file a suspicious activity report, and if you tell your client, you are guilty of tipping off. That is essentially what you have there.

One of the interesting things that is going to happen is with the arrival of FATCA, which is extraterritorial American legislation, where the world becomes an information policeman for the Internal Revenue Service, and how that is going to impact on all of these issues—data protection, for example, within the jurisdictions—is going to be a fascinating development of the jurisprudence.

MR. AMORESE: Just a quick thought. It is a difficult distinction, because we are not obliged to report if what you learn is what your client actually has specifically asked you. But it is less easy to understand where the line is, if the information that is suspicious is counseled on the side. That is very difficult. It is very difficult for lawyers to understand. Statistics that were issued last year revealed that there was not even one report from lawyers. So that probably exemplifies where at least the feeling is more toward the confidentiality than abiding by these reporting rules. But it is obviously something very difficult to decide.

MR. GALLIGAN: Do you think it is a little more strict in England and Caymans perhaps than in other countries in that respect?

MR. JONES: I think that is so. The Proceeds of Crime Act is in many respects about terrorist financing, and I think you will find that lawyers will tend to err on the side of caution. The key to it, of course, is to have a responsible financial reporting. So there is no alarmist behavior if they get ten reports, then if it starts to walk like a duck and talk like a duck, it is probably not a pigeon. So I think that the mix of responsibility between a responsible borrower and a responsible reporting authority is really what is required for this kind of thing to work.

AUDIENCE MEMBER: I just wanted to add one point to all of this on the money laundering. I think most European jurisdictions have subscribed to the OECD, so that overarches everything, and they are pretty tough.

MR. HAMMERL: Yes, but there are Swiss authority and European Union directives on this specific reporting and combined obligations, so the OECD is sort of out there. But what really becomes mandatory national law are these European Union directives.

For most U.S. clients the embarrassment or the inconvenience arises when simply forming a completely innocent nonpublic corporation or venture-backed corporation: it is very difficult for U.S. clients to understand why the European lawyer at the very beginning of the relationship wants to have intimate details—that in the U.S. would never be asked—in the form of knowing the ultimate beneficial owner of the top company in the chain. That is how this money laundering investigation touches on the ability simply to do business in many respects, much earlier than reporting to the authorities.

MR. PIEPER: I am sorry to interrupt here, but it is my ethical obligation to do that and to end on time.

Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?

By Thomas Gaultier

I. Introduction

One of the greatest and most noble quests ever to be undertaken by humankind throughout history has been the pursuit of justice. Among other functions of justice, one is to provide a solution for disputes arising between individuals or entities. When conflicts arise, justice can be a means to bring an end to them, in a final and compulsory way. Two parties who are experiencing a dispute have often not had a choice about how to resolve their conflict, since social codes, customs, laws and even cultural heritage often designate the means of resolution. However, history has shown that there is no one way by which disputes can be resolved. Indeed, in Greek antiquity, parties could request private hearings, where the equivalent of a modern day arbitrator would decide the outcome of the dispute. In ancient China parties would sometimes use an intermediary to help them come to a solution that would settle the dispute. Finally, in most medieval European monarchies, the king would decide on the outcome of differences between two opposing subjects.

There is a correlation between the examples described above and today's most common methods for achieving a sense of justice when two parties are faced with a conflict: litigation; arbitration; and mediation. Although litigation is generally seen as the traditional method for resolving conflict, the other forms of dispute resolution are increasingly being used, since they are sometimes better suited to achieve the justice that the concerned parties desire.

Contrary to litigation, arbitration and mediation are considered to be methods of alternative dispute resolution, in the sense that the parties can elect to submit their dispute to one of these two procedures instead of going through the default procedure—litigation. They enter such alternative procedure either by providing for such a choice by contract (particularly for arbitration), or on their own volition (most commonly for mediation).

Today's society is witnessing an era of globalization, where state borders can generally no longer prevent communications, trade, or movement of goods and persons, thus leading inevitably to an internationalization of disputes. This is particularly true for commercial relations, since the current trend is to become increasingly international by targeting new foreign markets and feeling out the best affordable services, even if they are halfway around the globe. One of the results of this trend is that commercial disputes have taken on new dimensions, which include foreign counterparties and multi-national entities. In dealing with the evolution of commercial conflicts, parties have increasingly found the national court systems inadequate for various reasons, ranging from cost, delay, inability to handle the technicalities of international disputes, and lack of qualification of national judges. Therefore, the actors on the global commercial scene have turned to alternative means to solve their disputes. They first looked to arbitration, which seemed to overcome the flaws that are found in litigation, as well as offering several advantages, such as confidentiality.

However, international commercial entities have been recently experiencing some drawbacks with arbitration, such as the increasing costs and delays, and are now starting to turn to another process of alternative dispute resolution, mediation. Mediation has been in use ever since conflicts have existed, but was generally, until recently, limited to local commercial disputes. However, the evolution of the global market and the demand for an even quicker, less expensive, and less adversarial dispute resolution procedure is leading to a new use of mediation, namely, in connection with cross-border commercial disputes.

The goal of this article is to analyze the implications of using mediation as a solution for reaching international commercial dispute settlements. In doing so, one must first define mediation, and then explore the current existing regulations pertaining to mediation, in order to set the legal framework applicable to the process. Consequently, an assessment of the value of cross-border mediation as applied to transnational disputes will be necessary, as well as an exploration of cultural issues involved in cross-border mediation, before concluding with a discussion of the future of international dispute resolution.

II. What Is Mediation?

In order to define mediation accurately, one must first explore several definitions of the process, then explain what is the role of the mediator and the lawyer, and finally describe the main types of mediation that can be used when facing a dispute.

A. Definition

Mediation is a process under which a neutral third party, or mediator, attempts to resolve a dispute between parties, in an amicable way. The mediator, unlike a judge or an arbitrator, assists the parties in reaching a settlement agreement on their own, without ever imposing a decision on them. The process is a voluntary one, which is there-

fore non-binding, even though the parties can agree to put the terms of their settlement agreement into a legally binding form,[1] a contract.

In addition to this definition of mediation, it is worth including the one given by the European Union Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("the Directive"), which defines the process as

> …a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

According to these two definitions, the most important element that stands out is the fact that the parties themselves are the ones who come to an agreement. Indeed, contrary to arbitration or litigation, the parties remain in control of the dispute resolution process at all times, and are free to leave the mediation if they wish to. In practice, mediation takes the form of a structured negotiation, where both parties share information, and exchange offers, with the assistance of a mediator, whose role is specifically to facilitate communication and collaboration between the parties so that they reach a settlement that is acceptable to them. Mediation is therefore a very informal process, which differs immensely from the formality of arbitration and litigation.

B. Role of the Lawyer

The lawyer's role in mediation is very different from the lawyer's role in arbitration or litigation, since the ultimate goal of mediation is to reach an acceptable settlement, while in the other methods, the goal is to defeat the other party by means of legal arguments and evidence. Therefore, the traditional function of the lawyer as an aggressive litigator to crush the arguments of the opposing party is less welcome in mediation, where, instead, the lawyer will in turn become a negotiator and an advisor for the client. In order to be an effective lawyer in mediation, a lawyer must be trained in negotiation techniques and, most of all, should come to mediation with a spirit of conciliation, prepared to make concessions and give in to some claims, in return of course for concessions from the other party, so that all can walk out of the room with an agreement that each can live with.

In addition to being trained in negotiation and mediation, lawyers who wish to be effective in mediation should properly prepare for mediation. However, this preparation is very different from the preparation for trial or arbitration. Indeed, it will consist of separating information into what can be disclosed and what should not, or should only be shared later on in the process, but also putting themselves in the opposing parties' shoes, in order to predict and identify the interests and needs that they will have in order to feel satisfied with the agreement that is reached. Also, the lawyers should discuss beforehand with the client what concessions they are willing to make, and what proposals they would be willing to offer. Moreover, it will be the lawyers' role to determine, with the client, the bottom line for the negotiation, as well as the best alternative to a negotiated settlement (BATNA), so that, at any phase of the mediation, the client will be able to assess what is on the table in relation to these elements.

Finally, since the main focus of this article is mediation of cross-border commercial disputes, the lawyers representing a client in mediation must also have sufficient knowledge of the economic dynamics affected by the dispute in order to help achieve a resolution that would place the client in the best business and economic situation.

C. Role of the Mediator

The role of the mediator in international mediation will be significantly different than if the dispute were a local one. Indeed, in addition to being a neutral facilitator who provides a fresh approach on the situation, acts as a guide for the reality testing of the positions of the parties, and assists to establish effective communication between the parties in order for them to be able to negotiate,[2] the cross-border mediator must have sufficient technical economic knowledge to grasp fully the commercial issues at stake in the dispute, but must also be able to master the underlying cultural issues of international negotiation—issues which will be discussed further down in this analysis.

Since every mediator is different, due to his or her mediation training, culture, and personality, the influence he or she can have over the mediation structure will vary in accordance with his or her style.

D. Different Styles of Mediation

There are many different styles of mediation which mediators can choose to adopt, or that the parties can require the mediator to adopt,[3] but for the purpose of this analysis, and in light of the area of commercial disputes, only the three most significant and most frequently used styles will be discussed: facilitative; evaluative; and directive.

1. Facilitative

The facilitative style of mediation, also known as the self-determination approach,[4] focuses on letting the parties themselves reach an agreement. The mediator will be a facilitator of communication between the parties, acting

also as a vessel that carries information and proposals from one party to another, helping them understand the issues at stake, and offering creative problem-solving techniques to help the parties reach their own agreement. The parties are truly the ones in control of this type of mediation, and a lot of weight is given to the interests and needs of the parties, in order for them to be able to understand the other party's position, so that a balanced negotiation can take place.

This style is the preferred style for solving commercial disputes in the United States, since the increased neutrality of the mediator leaves a place for the direct and efficient business discussions between the parties, who, by exchanging information and ideas, can often come to a sound commercially viable settlement agreement. The popularity of this style in the United States is partly attributable to the principle of self-determination of the parties, which is a very highly regarded value, allowing the parties to reach an agreement on their own. In such a context, it would be perceived badly by the parties if a facilitative mediator were to evaluate the proposals, since it is the perception of the parties that the mediator does not have the authority to criticize the will of the parties.

2. Evaluative

In the evaluative type of mediation, the role of the mediator will be different. Indeed, in such mediations the mediator can give recommendations and offer his or her views on the strengths and weaknesses of the legal aspects of a case, as well as criticize settlement proposals, and even suggest what might be a fair settlement.[5] It is important to stress, however, that, even if the mediator can "evaluate" proposals and situations, in no way is he or she authorized to force such an evaluation upon the parties, and cannot force the parties into agreeing to something that they would not be comfortable with.[6]

This type of evaluative mediation is often found in European countries, and the evaluations are generally highly welcome, especially in commercial disputes, where the mediator is probably someone with knowledge and know-how in terms of the business aspects of a dispute, in which case having such a person who can make suggestions can be beneficial for the settlement process.

3. Directive

In a directive mediation, the mediator will play the role of a facilitator, but also the role of a guide, and will go beyond the roles described in the two previous styles of mediation, insofar as to influence and persuade parties to agree to a settlement which the mediator considers to be a fair solution of the dispute. Professor of Dispute Resolution Nadja Alexander explains that in Germany, for example, dispute resolution processes which take place within government legal centers tend to follow a "directive, interventionist and right-based" method,[7] leading to a sacrifice of party self-determination for the benefit of an even more assisted mediation.

Moreover, in some Arab countries, the mediator is often viewed as a wise person in addition to being a facilitator, and his input is valued and respected. John Murray has commented that in Egypt it is even expected that the mediator will apply pressure to have the parties reach an agreement, since that is part of the function of the third party neutral.[8]

In a directive mediation, since the parties are expected to consider the suggestions of the mediator as the optimal solution, the process even draws close to an adjudication procedure, since the parties are pushed into agreeing with the settlement proposal of the neutral. Still, such is the will of the parties to select and accept a mediator who practices this type of mediation, which in some cultures will be highly efficient for resolving a dispute. Indeed, as was mentioned above, in mediation, the parties are the ones in control, and participate in the process voluntarily, according to their preferences and needs.

III. How Mediation Is Regulated

A. Overview of Local Developments in Various Countries

In order to understand the impact and effectiveness of cross-border mediation for commercial disputes, it is useful to provide a brief overview of local initiatives undertaken by various countries.

1. In the United States

The United States has always been known to be a litigious country, and as a consequence, the market for legal services has exploded, as has the caseload. This has inevitably created an increase in not only legal costs but also delays in court adjudications. Therefore, parties and organizations in the United States have always been pioneers in terms of developing innovative ways to keep parties away from the courts and arbitration.[9] A good illustration of this has been the Uniform Mediation Act ("UMA"), adopted in 2001 by the Dispute Resolution Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

This UMA offers the different states a model act setting forth provisions concerning mediation for them to adopt into their state legal systems, so that the rights and obligations related to mediation can be both simplified and harmonized across the entire country. Its purpose is also of course to promote mediation and to protect the rights of the parties involved in the process.[10] One of its main provisions is a legal privilege related to mediation communications, made either by the parties or the mediator, according to which these communications cannot

be used in a subsequent court procedure.[11] Another key provision of the UMA is the requirement for the mediator to report any situation in which he or she is faced with a conflict of interest, thus attempting to raise the minimum standards to guarantee a greater quality of the mediation process. Finally, the parties must use as a mediator a person who holds himself or herself out as a mediator.[12]

Virtually all states have either adopted the UMA directly, or in other cases have adopted local acts which provide the same minimum standard for mediation, including the right for communications to be privileged.

Mediation in the United States has existed for the past thirty years, and is now a method of choice for reaching settlement in commercial disputes (dispute resolution centers claim that the rate of cases which end up in trial varies between five and twenty percent, whereas the remaining eighty to ninety-five percent of cases are settled out of court, through mediation or negotiation[13]), and this is probably due to the fact that mediation is properly and efficiently regulated in this country.

2. In Europe

So far, each member state of the European Union has witnessed an increase in the use of mediation, as parties opt for using the method for its advantages compared to litigation and even arbitration. Therefore, member states have had to decide whether and how to regulate the use of mediation.

In Germany, commercial law has been driven by the principles of private autonomy and contractual freedom.[14] Therefore there is no legal framework making reference to how and when parties can negotiate. However, even though there is no statute regulating mediation, the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) still provides a certain level of protection for the mediation process. For example, Section 202 of the BGB states that the statute of limitations is suspended if the parties are engaged in negotiations. Thus, since mediation is a form of assisted negotiation, the parties are protected from the running of the statute of limitations, and can safely make all efforts to find an amicable solution through mediation. Also, the German Federal Supreme Court (*Bundesgerichtshof*) has decided that, if the parties have drafted a conciliation clause that clearly reflects their intention to refer to litigation as a last resort, the court will enforce the agreement to go to ADR upon objection of either party, thus rejecting the claim as temporarily inadmissible.[15]

In contrast to Germany, Italy has enacted various statutes and regulations regarding mediation. The most important one is Bill 5492, which provides a definition of mediation, as well as its scope within the Italian dispute resolution system.[16] This legislation provides that judges may refer cases to mediation, thus staying the proceedings; it also imposes upon lawyers a duty to inform clients about mediation, and defines pecuniary limits and time frames for mediation. In addition, the Italian legislation on mediation provides that, if the parties have not been able to reach an agreement, the mediator can make a final settlement proposal,[17] upon request from the parties.

Concerning England and Wales, a new unified civil procedural code was introduced in 1999, which encouraged the use of out-of-court resolution of disputes[18] and facilitated the settlement of disputes at the earliest stage possible. These new procedural rules in favor of mediation enabled the development of several state-sponsored mediation institutions, such as the Civil Mediation Council and the National Mediation Helpline. These institutions developed mediation in England and Wales through offering a forum where the process can take place, and by educating potential users to the mechanisms and advantages of mediation. In addition to these initiatives, the Commercial Court in England decided in *Cable & Wireless v. IBM United Kingdom*[19] that the proceedings would be stayed until the parties had referred their disputes to alternative dispute resolution. The English courts even went so far as to impose sanctions on parties who failed to give proper consideration to a mediation proposal, even when there was no obligation to mediate in the first place.[20]

Belgium enacted a Mediation Act in 2005, providing some key elements for the protection of the mediation process. Indeed, the Act requires a judge to stay proceedings at the request of either party if there is mediation clause in the contract. It also sets forth that the suspension will only apply to a mediation which is being conducted by an approved mediator who is certified by an institution guaranteeing the independence and quality of mediators. Finally, among other provisions, the Belgian Act also states that all documents and communications made in relation to or during the course of the mediation are confidential.[21]

In France, where mediation is a relatively new process, the legislature has nevertheless integrated a set of provisions into the French New Civil Procedure Code, through Decree n.º 96-652 of July 1996. Moreover, the French *Cour de Cassation*, which is the highest instance in France, had already been considering the issues of enforceability of mediation clauses in decisions which analyzed whether claims can be temporarily inadmissible if the parties had not fulfilled their contractual obligation to mediate.[22] These rulings of the French Supreme Court were harmonized by the Mixed Chamber of the same Court in the *Poiré v. Tripier* decision, which states that, if the language of the mediation clause is sufficiently clear, French courts will enforce it if either party invokes it as a bar to litigation.[23]

These selected European examples of how mediation is regulated clearly show that there is no uniformity in the

area of mediation across the European Union, and that each member state has decided to adopt its own individual rules and laws concerning the matter. Unfortunately, this does not favor the development of cross-border commercial mediation if the standards are different from one country to another within the Union and the rest of the world.

B. Firsts Attempts at Transnational Regulation

In spite of the local particularities each county has decided to adopt in terms of mediation regulation, efforts have also been made on an international level to attempt to harmonize minimum standards for mediation, as well as develop and encourage the use of the process. The first multi-national text which set out the guidelines for out-of-court settlement with a third-party neutral was the UNCITRAL Conciliation Rules of 1980. Later, in 2002, a Model Law on International Commercial Conciliation was adopted by the UNCITRAL, and finally, more recently, the European Parliament and Council have issued the directive on certain aspects of mediation in civil and commercial matters in 2008.

1. The UNCITRAL Conciliation Rules of 1980

With the rise of globalization and the increase of international trade, the international community felt the need to establish conciliation ground rules that would be acceptable in countries with different legal and economic systems,[24] as well as with different cultural perspectives on disputes. These conciliation rules provide a set of procedural regulations that are available to parties, and govern their mediation/conciliation process if they choose to be subject to them. Some of the elements covered by the rules relate to the method of appointment of the conciliator, his or her other role, the general conduct of the proceedings, but also the issues of confidentiality, admissibility of evidence and limitations on undertaking other adjudicatory procedures during the process of settlement discussions. In addition, the text suggests a model conciliation clause that can be used in contracts.[25]

These rules were the first international step taken to harmonize international dispute settlement without an adjudication process.

2. The UNCITRAL Model Law on International Commercial Conciliation of 2002

The Model Law on International Commercial Conciliation, adopted in 2002 by the United Nations Commission on International Trade Law, is a testimony to the global recognition of the importance of mediation/conciliation.[26] These rules are designed to be default rules, meaning that they will apply if the parties do not provide for any body of procedural rules to govern their mediation.[27] When it comes to the specific difference between mediation and conciliation, the model law uses the terms interchangeably, and describes the process as one where parties ask a third party to help them in their efforts to reach the amicable resolution of a dispute arising from a legal, contractual or other relations, or linked to such relations. The Model Law recommends that all states consider enacting legislation in light of these rules, with the view of creating a uniform legislative framework for the application of mediation procedures in cross-border commercial disputes.[28]

As to the content of the Model law, it includes many important legal issues that may arise in relation to mediation. Some of the provisions govern the number and selection of mediators, the conduct of the procedure, how communications between the neutral and the parties are to be regulated, the disclosure of information, confidentiality, matters of evidence, the possibility of having a hybrid system of mediation and arbitration, and finally the enforceability of settlement agreements arising from mediation. The Rules also make a recommendation for states to enact local legislation that would guarantee the suspension of the limitations period when mediation starts, and for it to restart in the event of a failure of settlement discussions.[29]

This model law marks a significant step forward in the area of cross-border mediation, which not only illustrates a trend toward the increased use of this means of dispute resolution, but also provides a solid international legal basis that can serve as a reference for countries that wish to adapt their current legislation to a global framework, while guaranteeing a harmonized use of mediation in situations of transnational commercial disputes. Parties from different countries can now subject their out-of-court dispute resolution process to a specific set of rules that is broad but detailed enough to permit the conduct of efficient cross-border settlement discussions.

3. The 2008 European Directive on Certain Aspects of Mediation in Civil and Commercial Matters

In 2008, the European Parliament and the Council ended a ten-year preparation of the text of a European Directive that is meant to provide a minimum legislative framework to all twenty-seven members of the European Union.[30] The purpose of this directive is to regulate certain aspects of mediation in civil and commercial matters, to harmonize the legal status of mediation throughout the whole European Union, and to underline the increasing role mediation is playing in business relations. Finally, the Directive takes a position on the minimum requirements for the use of commercial mediation.[31]

Moreover, to quote the Directive itself in its Article 1, the purpose of the Directive is to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."

The scope of the Directive is also defined, in its Article 2, which states, "This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law."

As briefly illustrated above, some states of the European Union have already adopted legislation related to mediation. However, there has been no uniformity across the EU as to the legal status of this process. Indeed, some countries, such as England, have embraced mediation very rapidly, but others still are not using its possibilities to the fullest, thus hindering the overall growth of commercial activities between member states.[32] Consequently, and in this context, the European Parliament and Council have adopted this directive, in order to enhance the development of cross-border commercial relations.

Before proceeding with a more detailed analysis of the content of the Directive, it is useful to mention how it is situated in the hierarchy of norms within member states. Since the European Union is not a sovereign state, the European Parliament does not have the same powers as a traditional state parliament would. Nevertheless, member states have granted the European Parliament the ability to issue "directives," which are "statements of political or governmental objectives that each of the sovereign states constituting the Union must thereafter achieve by enacting laws that are consistent with those objectives."[33] The Directive, in its Article 12, stated that the member states had to have transposed it into their national legal systems by 21 May of 2011, and could do so by enacting laws of their own, provided that they do not contradict the general principles set forth in the Directive. Hence, the Directive is not a uniform law applicable to all member states of the European Union, but rather a detailed set of principles related to mediation that was to be adopted in each member state and that would ultimately provide parties with a consistent and more harmonized legal framework to govern their cross-border commercial mediations.

In regard to the scope of the Directive, it was drafted in such a way as to apply to all cross-border disputes in civil and commercial matters, but clearly stated in its explanatory note 8 that nothing should prevent member states from applying the provisions to internal mediation processes as well. Additionally, it was drafted with the goal of encouraging the use of mediation, and thus did not prevent state legislatures from imposing the use of mediation, even though mediation is designed to be a voluntary procedure. Even though it is predictable that there would be variations in the domestic transpositions of the directive, it nevertheless serves as a minimum standard for mediation involving cross-border disputes.[34]

The main provisions of the Directive concerned the quality of the mediation,[35] the promotion of the use of mediation,[36] the enforcement of mediation agreements,[37] the confidentiality of mediation,[38] and the expiry of limitation periods during the process of mediation.[39]

(a) The Quality of Mediation

The Directive, in its Article 4, encourages mediators and organizations to develop voluntary codes of conduct in order to guarantee better control over the providing of mediation services. The goal of this aspect is to ensure that mediation is conducted in an impartial, effective and competent manner for the participating parties. In addition, member states are encouraged to develop the training of mediators, in order to guarantee that the competence and knowledge of mediators are sufficient to provide adequate and satisfactory mediation services.

(b) Promoting the Use of Mediation

In its Article 5, the Directive invites the courts to refer cases to mediation in order to settle a dispute when it deems it appropriate, taking all the circumstances of the case into account. The Directive also invites parties to educate themselves as to how mediation works by attending information sessions if they are available. As mentioned above, the Directive does not prevent state courts from making mediation mandatory, either before or during judicial proceedings, so long as it does not prevent the parties from their right of access to the judicial system. It should be noted, however, that when the Directive opens the door to mandatory use of mediation, it does not aim at violating the voluntary aspect of this method, since the Directive never prevents the parties from staying in control of what happens during mediation, or leaving a mediation at any time.

(c) Enforceability of Mediation Agreements

Article 6 of the Directive requires member states to provide for enforcement of mediated settlement agreements that result from mediation.[40] The reason behind this provision is that parties from different states, and which fall under different legal systems, will now be able to enforce a mediated agreement in their respective countries through a judgment or court order.[41]

However, the parties will need to bear in mind that states will not be required to enforce settlement agreements if these violate other aspects of national law. Since mediation can often result in finding creative alternatives for the resolution of a dispute, the parties must make sure that these alternatives, if any, can be legally enforceable in one country or another, and can, for example, be executed by a court order of judgment in the different countries of the parties.[42]

It is also useful to point out that, even though the Directive provides for enforceability of mediation agreements, it remains silent about the enforceability of agreements to mediate, which leaves up to each state the

decision on whether and how to regulate agreements to mediate.[43]

(d) Confidentiality of Mediation

One of the strongest aspects of mediation, which is crucial to the development of this means of dispute resolution, is the confidentiality of documents and communications arising out of or in connection with the process. Article 7 of the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent proceedings between the parties. There are, however, two exceptionS to this principle: (i) "where it is necessary for overriding considerations of public policy of each member state, particularly when required to ensure the protection of the best interest of children or to prevent harm to the physical or psychological integrity of a person"; and (ii) "where disclosure of the content of the agreement resulting from mediation is necessary to implement or enforce that agreement." There is nothing in the Directive preventing member states from enacting stricter measures to protect the confidentiality of mediation.

This provision is the first step toward protecting the confidentiality of mediation, but it has one very important drawback: it only prevents the *mediator* from being compelled to share information, but not the parties. In sum, another way of reading this part of the Directive is that "any statement, offer, demand, or concession made by any party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast or entered in evidence by anybody, except the mediator."[44] Needless to say, the lack of privilege, when the information is transmitted by the parties, is a significant flaw in the Directive, which would technically enable parties subsequently to use such information in a court proceeding, in arbitration, or even to the press.[45] It will now be up to each member state to implement the respective provisions concerning confidentiality in a manner that takes this element into account.

(e) Expiration of Limitation Periods

In Article 8, the Directive covers the issue of the expiry of limitation and prescription periods during the mediation. As was mentioned above, many member states have already either enacted legislation on this issue, or issued court decisions on it. However, the Directive reinforces the fact that, if the parties choose to attempt to solve their dispute by the means of mediation, they cannot be prevented from subsequently initiating judicial or arbitral proceedings due to the expiration of the limitation or prescription period during the mediation proceedings.[46] This was motivated by the desire to protect the principle of fair access to justice should the mediation fail, hence encouraging parties to try to solve their dispute through mediation.[47] The limitation period is not expressly suspended, it simply cannot expire. It will be up to each state to enact its specific legislation regulating how this provision is to be applied.

By creating a formal framework for mediation within the European Union, coupled with the pre-existing model laws and legislative acts of individual countries, including those who are not members of the EU, it becomes clear that in today's world cross-border commercial mediation is definitely regulated enough to allow parties to be confident in trying to use the process.

After having explained what mediation is, and how it is regulated in various areas of the world, one must then evaluate if cross-border mediation could be an effective solution for international dispute settlement in today's increasingly international business world.

IV. Mediation as a Method of Alternative Dispute Resolution for Cross-Border Disputes

A. Overview of the Already Available Dispute Resolution Methods

To understand where mediation stands within the landscape of dispute resolution methods, it will be useful to make a summary of the main aspects of negotiation, arbitration and litigation.

1. Negotiation

Negotiation is the least formal method of solving commercial disputes, where the concerned parties communicate directly in order to try to reach a solution to their conflict. There is no formal structure for the process of negotiation, and very little legislation governing it.[48] The success of negotiation will depend solely on the will of the parties, which can be both an advantage but also a drawback. The advantages of negotiation are that the parties are free to choose the way the negotiation will be conducted, and that the information pertaining to the dispute at hand remains between the parties. However, such an informal process might in practice hinder the success of settlement, since parties who are facing a dispute are generally bitter, and sometimes even angry, making direct communication difficult, and thus minimizing the chances of reaching a negotiated solution. Moreover, they may not have a realistic perception of the respective strengths and weaknesses of their positions.

2. Arbitration

Arbitration is an adjudication method which is less formal than litigation, but more regulated than any other method of dispute resolution. Arbitration is generally initiated at the will of the parties, through an arbitration clause included in a contract. Pursuant to this clause, an arbitral tribunal will be constituted, which will contain one or more appointed or selected arbitrators, who will

serve as judges of the dispute. Arbitration is often associated with the concept of privatized justice, since the procedural rules and substantive rules that will apply to the arbitration are chosen by the parties. For example, arbitration allows commercial companies to turn to an arbitration organization which abides by certain procedural rules and which will appoint arbitrators who are experts in the commercial field at hand, who will themselves render an award according to the substantive law of a certain country. This gives the concerned parties some control over the process, even though the outcome of the procedure is entirely out of their hands. Arbitration also has the advantages of being confidential. The arbitration award is generally not subject to an appeal, and will be recognized and enforced in many countries.[49] However, the costs and delays associated with arbitration have become increasingly high, and the formality of the procedural rules of the process, in matters such as evidence and discovery, sometimes makes arbitration very strenuous for the parties.

Arbitration has been up to now the method of choice for solving cross-border commercial disputes, since multinational companies did not want their disputes publicized and wished to keep a certain degree of control over the process, while still wanting the outcome to be binding, final, and internationally enforceable.

3. Litigation

Litigation is the traditional method of dispute resolution, by which the parties submit their claim to a court, and where a judge will decide on the outcome of the conflict, usually by allocating fault to one party, and sentencing that party to some form of compensation for the damages incurred by the opposing party or mandating the defaulting party to specifically perform its obligations. Litigation is a public process; it is subject to very formal specific laws, both procedural and substantive, which the parties cannot choose from, since their application is determined by the conflict of laws rules in matters of international disputes. In addition to the publicity and mandatory application of state laws, litigation generally suffers from severe delays, and it can often take over five to ten years for the court to reach a final decision. Moreover, that decision is subject to an appeal, and the appellate court decision can also be appealed in some jurisdictions. This makes the certainty of a final and binding solution for the dispute only available many years after the dispute has arisen. Moreover, the decision, both in the court of first instance and on appeal, may be made by judges (or in the court of first instance, lay juries) who are not experienced in analyzing and resolving complex cross-border disputes.

It seems clear, with this very brief description of these three methods, that they each have their advantages and disadvantages, making them more or less suitable for solving cross-border commercial disputes. Even though arbitration has taken the lead as the most used means of transnational dispute resolution, mediation definitely has some attractive elements, which could make it the new solution for reaching international dispute settlement in matters of transnational business.

B. Advantages of Mediation

The main advantages of mediation which need to be mentioned are the cost and speed of the process, but also the rapport that is created between the parties during mediation, as well as the control they have over the process.

1. Time and Cost

It is well known in commercial matters that costs and speed are crucial factors for conducting a business. Thus, it seems that the best possible method to solve commercial disputes would be a means that offered advantages both in terms of time frames and modest costs.

Generally, a commercial mediation will take about one day, and if the complexity of the international commercial dispute is above average, it will sometimes last a total of two days to reach a mediated settlement agreement.[50] In order to prepare for mediation (by conducting pre-mediation meetings between the mediator and the parties), to schedule the mediation session(s), and to proceed with the mediation itself, the estimated total time for cross-border mediation to take place will be about three months. Parties to an international dispute now have the chance to bring closure and settlement to their dispute within such a time frame, which is far more beneficial for both the parties and the business itself than the year or more that arbitration may take, or the three or more years it might take for a court to issue a ruling.

The short period of time it takes to conduct mediation influences the cost of the process significantly, since the time not spent in arbitration and litigation is time that could be used to conduct more business. But it also means that companies will have significantly less expense in court and lawyer fees. In addition, the cost of a mediator for one day of mediation generally ranges from $5,000 to $12,000, and considering that commercial mediation rarely takes more than two days, this expense is clearly more affordable than arbitration. Overall, companies that regularly use mediation benefit from greater savings in legal costs and less management time spent on dispute resolution.[51] The following chart is an illustration of comparative costs and time frames associated with arbitration and mediation, and is based on $25 million disputes handled by the International Chamber of Commerce.[52]

Assumptions	Arbitration	Mediation
Facilitators	3 Arbitrators	1 Mediator
Internal Counsel per Party	1	1
External Counsel per Party	3 (1 Partner + 2 Assoc.)	1 Partner
Witnesses for both Parties	10 (6 fact + 4 expert)	0
Document Production	Moderate	None
Venue	London, UK	London, UK
Hearing Time	1 week	2 days
Cost Items		
Institution	72,500	8,000
Arbitrators/Mediator	408,500	25,000
Internal Counsel	100,000	10,000
External Counsel	2,000,000	50,000
Facilities	5,000	2,000
Document Production	50,000	0
Witnesses	100,000	0
Travel	100,000	25,000
Total Costs	**US$ 2,836,000**	**US$ 120,000**
Average Time		
Hearing	1-3 weeks	1-2 days
Preparation	12-18 months	3-5 days
Overall Resolution Time	18-24 months	2-3 months

The comparison of arbitration and mediation in this chart illustrates that the total cost of mediation would represent less than five percent of what arbitration would cost, and the time allocated to mediation represents between ten percent and fifteen percent of the time necessary for arbitration.[53]

The American Arbitration Association also conducted an international survey in 2006, in which it inquired about mediation by questioning one-hundred-one *Fortune 1000* Companies with mean revenues of $9.09 billion.[54] The results show that the first reasons for using mediation include saving money and saving time. Indeed, ninety-one percent of questioned companies said saving money was a reason to use mediation, and eighty-four percent of them listed saving time as one of the reasons. In addition, the responding companies stated that in seventy-seven percent of cases mediation reduced the costs to resolve disputes (compared to litigation) and that in eighty percent of cases mediation decreased the time it took to solve disputes.

In addition to saving time and money, mediation also allows the parties to continue their business relations.

2. Rapport Between the Parties

Mediation permits the parties to come to an amicable solution that will settle their dispute. The result of a mediation can therefore be a "win-win" solution, since the parties need to both agree for there to be a settlement, and they will obviously only agree to an agreement that is acceptable for them. In mediation, the parties are not in a direct adversarial situation as they would be during arbitration or litigation, and they are rather in a collaborative situation, which requires them to understand, agree with, and give in to the opposing party. With the help of the mediator, parties are able to rebuild the trust that was broken, which might have led to the dispute, or might understand more thoroughly the reasons why one party defaulted on its obligation. Whereas in litigation or arbitration the search for a culprit is the main element of the procedure, mediation is really not about who is right or who is wrong, but rather about how the parties can make things better in the future. In relation to business relations, the public finding of wrongdoing in the business setting will surely have undesired repercussions on the losing party in arbitration or litigation, either for future business transactions or even reputation.[55]

The dynamics of mediation cause the parties to put themselves in the other's shoes, and to view the dispute from a different perspective, without focusing on the fact that the opposing party is an adversary, but instead, considering them as a partner with whom they must collaborate in order to find an acceptable solution to the dispute. If parties mediate in good faith, often the commercial relations resulting from the mediation may even be better than before they entered into mediation, since they have had the possibility through the process to be creative and even develop new business perspectives which would satisfy them both.

The collaborative aspect of mediation is one of the main reasons why mediation is perfectly suited for cross-border mediation, since usually both parties have either been working together for some time, or are expected to be working again together in the future. By using mediation to prevent their business relationship from negatively spiraling out of control, business partners are able to put aside the conflicted aspect of their relation in favor of more opportunist aspects, have the chance of salvaging a business deal gone sour, and even have the opportunity of building on their pre-existing partnership.

Commercial players are now able to solve their disputes in a fast and less expensive manner, while maintaining ongoing business relations with other players of the commercial scene, therefore saving money, time, and the hassle of losing a business partner for good.

The elements clearly illustrate the main advantages of commercial mediation, which are emphasized in the situation of a cross-border dispute, but one last element needs to be explained, and that is the control the parties have over the process.

3. Control Over the Process

Mediation is one of the least formal alternative dispute resolution processes there is, since the parties (i) choose the mediator, (ii) choose which type of mediation they want, (iii) choose whether to engage in negotiation discussions during the mediation, (iv) choose whether to exchange information (v) choose to accept proposals as they please, and (vi) can even choose to leave the process whenever they want to. Mediation is designed to empower the parties, because parties who feel they can control the outcome of a dispute tend not to be able to resist trying to resolve their dispute according to their own terms. Therefore, with the help of the mediator, who will maintain the balance of power during the mediation, the parties are free to go as far as they wish to in order to put their conflict behind them.

In addition to empowering the parties into having almost absolute control over the procedure of mediation, the parties also are empowered as to the substance. Indeed, in contrast to litigation or arbitration, which can offer only a limited number of remedies to resolve the dispute, there is no limit as to what kind of remedy the parties can agree to in their mediated settlement agreement. For example, remedies that can be contemplated with mediation include (i) agreements to work together in the future, (ii) covenants not to compete, (iii) structured settlements, (iv) specific performance, (v) earn-outs and (vi) even apologies,[56] which are highly regarded in some cultures in matters of international transactions.[57]

This freedom to decide on the practical outcome of the dispute is a key factor which makes cross-border commercial mediation a very appropriate means to solve international business disputes.

After having assessed the advantages of mediation for international commercial disputes, it is also worth exploring how effective this process can be.

C. Current Effectiveness of Mediation

In order to evaluate the effectiveness of mediation for cross-border disputes, three elements should be taken into consideration: the enforceability of mediation clauses; the enforceability of mediated settlement agreements; and, finally, the success rate of this settlement procedure.

1. Enforceability of Mediation Clauses

In most international commercial contracts, the parties include a dispute resolution clause, which in many cases is only an arbitration clause, but often there is also a duty to try to resolve the dispute in good faith in an amicable way. The parties sometimes see this second part as a negotiation clause, but since negotiation is not regulated, such a duty is unlikely to be enforced in court. Mediation on the other hand is increasingly being regulated, both domestically and internationally, and in some countries, courts refuse to hear a claim if mediation was not attempted beforehand.

Indeed, in countries such as Germany, England, Belgium and France, the legislature or the courts have already provided that in cases where the mediation clause is sufficiently clear, the courts will not hear a claim if one of the parties has invoked the duty to mediate and that duty has not been satisfied.

Even though the European Directive is silent on the issue of the enforcement of mediation clauses, it appears that an increasing number of states are already adopting some form of regulation in order for mediation clauses to be enforceable. This enforceability contributes greatly to the development and success of mediation in cross-border disputes, since the parties are now assured that they can benefit from trying to mediate their dispute before moving on to an adjudicative procedure.

2. Enforceability of Mediated Settlement Agreement

Another important issue related to the effectiveness of cross-border mediation is whether the mediated settlement agreement can be enforced by state courts. There are two different ways that courts could be able to enforce mediation agreements: first, simply ratifying the settlement agreement and issuing a court order for its enforcement; second, recording the settlement agreement in the form of an arbitral award.

Generally a mediated settlement agreement will take the form of a legal contract that is signed by the concerned parties and that puts in writing their respective obligations. Since it has the legal status of a contract, the settlement agreement normally has a limited binding force, since parties are always free to breach a contract, even though they will have to face the consequences of such breach. Thus, the mere status of a contractual agreement might make the parties feel insecure about the outcome of mediation, even if during the process they actually manage to reach a consensus. The parties to an international commercial mediation will surely not want to take their chances in mediation if there is a risk that the other party then defaults in its obligations, thus forcing the non-defaulting party to bring a lawsuit for breach of contract.

It is to avoid this risk that the European Directive on mediation provided in its Article 6 that member states must legislate for the right of state courts to enforce mediation agreements, by having them become court orders, judgments, or decisions which can then be enforceable in all other member states in accordance with already existing European Union law or domestic law on the recognition and enforceability of foreign judgments of member states.[58] This measure will definitely, in Europe at least, ensure the effectiveness of international mediation, since

there will be a guarantee that the mediation settlement agreement can be enforced.

The other method for guaranteeing the enforceability of a mediated settlement agreement is by ratifying it in the form of an arbitral award. Indeed, whereas mediation agreements still do not benefit from the international recognition they deserve, arbitral awards on the other hand are recognized and enforced in all signatory countries of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. If a mediation agreement could enjoy the same regime as arbitral award, it would immensely benefit the development and use of mediation in commercial disputes.

So far, very few organizations are proposing to treat mediated settlements as arbitral awards for the sole purpose of their enforcement, one of them being the Singapore Mediation Centre and the Singapore International Arbitration Center, also designated as the SMC-SIAC Med-Arb Service.[59] The unique feature of this service is that, after having selected the mediator and having been through the mediation process itself, if mediation was a success and the parties have reached a settlement agreement, the parties can then appoint the mediator they used for mediation as an arbitrator for the sole purpose of recording any settlement reached in the form of an arbitral award containing the agreed terms.[60] This would then allow the mediated agreement to be enforceable extra-territorially in the countries and territories which have acceded to the New York Convention, while nevertheless still being subject to the prevailing laws of the relevant jurisdiction in which the award is sought to be enforced.[61]

Similar to the SMC-SIAC Med-Arb Service, the Mediation Institute of the Stockholm Chamber of Commerce has also adopted a rule providing a result that resembles the Singapore feature. Indeed, Article 12 of the rules of the Swedish Mediation Institute states that, upon reaching a settlement agreement, the parties may, "subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to ratify the settlement agreement in the form of an arbitral award."[62]

In the context of international disputes, being able to use mediation and have its resulting agreement be able to be applied almost worldwide definitely is an attraction, and underlines the concrete effectiveness of cross-border mediation, even though the process is still at an early stage.

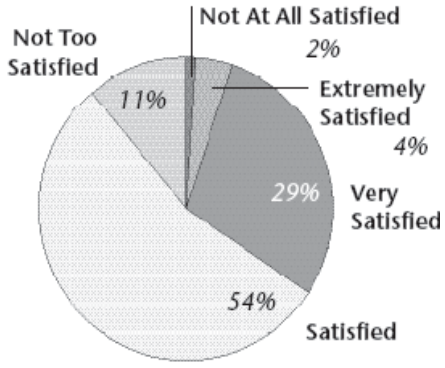
3. The Measure of Success

Many different factors could be taken into account to measure the success of mediation. However, for the purposes of this article, only the settlement rate and satisfaction of the parties will be considered.

Most mediation organizations report that the settlement rate is very high through mediation. Indeed, one study found that the combined average rate for four mediation service providers was seventy-eight percent,[63] but in matters of commercial mediation, the probability of settlement is usually in excess of eighty percent.[64]

This attractive success rate is understandable in countries like the United States or England, where mediation is already a widespread and generally accepted process, but, surprisingly, the rate is almost just as high in some European countries as well. The ABC mediation organization in the Netherlands, for example, stated that in 2006 the success rate for mediation of commercial disputes, where there was above €5 million in dispute, reached seventy-nine percent, and a survey conducted in France by the CMAP, the "Center for Mediation and Arbitration of Paris," revealed that for commercial disputes the settlement rate was above seventy percent. Some would argue that an average of eighty percent is not that high, considering that the overall settlement rate is apparently closer to ninety-two percent,[65] a difference which could lead one to think that mediation is not all that effective. However, such an argument cannot stand, because in an overwhelming majority of cases, the lawyers for the parties had previously attempted to reach a settlement through negotiation, but after the settlement discussions failed, they decided to bring their dispute to mediation. Bearing this in mind, many cases submitted to mediation are therefore disproportionately tough cases.[66] Consequently, an average settlement rate of eighty percent with mediation becomes much more impressive.

The other main element by which the success of mediation can be measured is the satisfaction of the parties with the process. Studies have indeed shown that the parties are in general very satisfied with the process, as the ninety-two percent rate of willingness to repeat mediation presented by the Dutch ABC mediation organization in 2006 suggests. The American Arbitration Association Survey also reported that a vast majority of companies—eighty-seven percent—were either satisfied, very satisfied, or extremely satisfied with their recent experiences with mediation, as shown in the chart below.[67]



Company Satisfaction with Mediation

The satisfaction parties have with mediation probably originates from the fact that mediated settlement agreements are reached by the parties themselves and not through a decision or ruling made by either a judge or an arbitrator. In addition, parties are probably more inclined to be satisfied with mediation because, however successful the outcome is, there is no "losing party" in mediation, since the ultimate goal is to agree to a "win-win" solution which is acceptable for the parties, and even if the process does not end in a settlement agreement, the parties will have at least believed they have been heard, will have understood the situation more clearly, and will have had the opportunity to do some reality testing as to the strengths and weaknesses of their case.

D. Drawbacks of Mediation

The main drawbacks of mediation come from the informal aspect of the process, and include the need for voluntariness, the need to assure confidentiality, and the need for cooperation of the parties. Another negative element that comes into play is the difficulty to ensure that the mediators are sufficiently qualified. Finally, mediation, especially cross-border mediation, can be hindered by cultural differences between the parties.

1. Voluntariness

As we have seen, recent legislation or court decisions in various countries provide for the enforceability of mediation clauses. However, this enforceability is limited by the fact that the parties must try to mediate their dispute in good faith. One of the main strengths of mediation is the fact that the parties are in control, but this also leaves open the option for either party to leave the mediation at any time. Voluntariness therefore can also be a drawback, because at any time a party can simply decide to abandon all efforts to reach a settlement, and the energy and expense that will have been invested will be lost. This is clearly a downside of mediation, and contrasts with the certainty of an outcome that the parties can find in adjudication procedures. Nevertheless, even though the risk of one party walking away from mediation exists, it may encourage parties to make the good faith effort to mediate, by never presenting outrageous proposals which could cause an opposing party simply to leave. With the risk of having one party abandon the mediation, it brings some sort of balance to the process, since both parties know how fragile it can be if one party acts out of line, or presents offers which are too extreme and can be seen as insulting.

2. Confidentiality

Confidentiality has always been a very dear issue to parties that are facing a dispute. This is especially so when the parties have had a previous business relationship, and each party does not want the other party to be aware of any vulnerabilities one party may have. This takes on even greater importance if the mediation fails, since any information shared during mediation is then known to the other party. Despite the fact that it might not be admissible in court or arbitration, the simple fact of being aware of some information can be useful to one party in presenting legal arguments to a tribunal.

Mediation is a consensual process, and one factor necessary for its success is the communication of information to the other party. If one party refuses to communicate any information (which could be anything from the production of a document to the making of a settlement offer), there is a fair chance that the opposing party will not want to communicate information either. However, if parties decide to show some good faith and offer some information, then the mediation process will make progress, but will also expose the parties.

In addition to the parties themselves being aware of confidential information, the mediator will become privy to confidential information about the disputants, particularly during a "caucus," which is a private session between one of the parties and the mediator during which the mediator assists the party in evaluating and formulating settlement proposals and understanding the issues that are being discussed. During one of these caucuses, one party can share information with the mediator which they do not want him to repeat to the opposing party, and for the sole purpose of helping the mediator understand the situation better. When the mediator will go into caucus with the other party, there is no concrete guarantee that he will keep the previously shared information confidential, and the professionalism of the mediator is the only assurance the parties will have.

Finally, concerning confidentiality, there is also a risk that if the parties fail to reach an agreement during mediation, they will try to invoke information that was shared during the mediation process to support their claims in court or arbitration. This was one of the major downsides of mediation before the process began to become regulated. However, the increasing regulation of mediation is putting an end to this threat, as most laws on mediation provide that any information arising from mediation is inadmissible in court or in arbitration.

3. Cooperation of the Parties

Mediation is a process that can only go as far as the parties wish to take it. In contrast to court proceedings or arbitration, where the judge or arbitrator will issue a ruling regardless of how the parties behave, for mediation to be successful there must be cooperation between the two opposing parties. This is one of the drawbacks of mediation, since it makes the process subject to the mood and feelings of such party, which unfortunately is often a barrier to settlement. If one party is not cooperative, the entire balance of mediation is lost, and it will be extremely difficult to reach a settlement. This is where the mediators have a critical role to play, since one of their roles is to

maintain this balance, and bring the two parties, who have every reason not to trust each other, to the table to discuss ways to resolve their problem. Unfortunately, sometimes the parties are simply unable or unwilling to put in the effort to cooperate, or do not succeed in getting past personal feelings, thus leading to an impasse in mediation. In these types of disputes, when parties are unwilling to cooperate, mediation reaches its limits, and another more adjudicative procedure will probably be best suited to resolve the dispute.

4. Mediator Qualification

The issue of mediator qualification is especially important for cross-border commercial mediation, since the complexity of the issues that will be discussed will probably be greater than in a domestic civil matter. Indeed, an international dimension will be brought to the table, with both parties possibly not speaking the same language, or not being equally comfortable in a particular language. The mediator should therefore be very carefully chosen, and should be able to be proficient enough in the languages of both parties, so that if needed, they can talk to the mediator in their native tongue in order to make themselves perfectly clear when they negotiate. In addition, the mediators for a commercial dispute should be selected based partly on their business perspective, since the parties will need the mediator to understand the commercial implications of the dispute, as well as help the parties find creative but commercially feasible solutions to solve it. Regrettably, there is little uniformity in the training of international mediators. Mediators are often trained in a particular country, and then build experience, which may or may not be international in nature, meaning that there is no accurate way to evaluate the level of qualification of mediators. Usually parties select a mediator who has been recommended to them, either by a business partner or a trusted contact, but they can also turn to mediation service providers that require their mediators to meet certain professional standards. In order for mediation to be successful, the parties need to trust the mediator, and it is sometimes difficult for parties who face a highly complex transnational commercial dispute to find a mediator who is sufficiently qualified. Although the lack of uniformity in qualifications is one of the drawbacks of mediation, the parties can overcome that drawback by simply meeting different mediators before choosing the one who will mediate their dispute, allowing them to get to know how the mediators work, what type of mediation they are most comfortable with, what level of expertise they have and which languages they speak. Since mediation is a very personal process rather than a purely legal one, the parties can trust their personal judgment when they select a mediator in a manner that, in spite of the lack of uniformity of mediator qualification, allows them nevertheless to find a sufficiently competent mediator to mediate their specific dispute.

5. Cultural Differences

When mediating cross-border commercial disputes, the parties as well as the mediator may find that this dispute resolution method is hard to apply when those involved in mediation come from different cultural backgrounds. Indeed, in addition to the language barrier, which is relatively easy to overcome in this age of globalization, the cultural background of individuals heavily influences the way they will conduct a negotiation. Even though the mediator's role is to maintain balance between the parties, this is not easily done when the parties, by their behavior, communicate in different terms, notwithstanding the fact that they may be speaking the same language. Cultural differences will not only influence how parties will behave during mediation, but will also affect their perception of what is being presented to them by the opposing party. The existence of cultural differences can therefore obstruct the mediation process, and, if not understood and taken into consideration, can even make the relationship that the parties had before trying mediation worse. For international commercial disputes involving parties from different cultures, mediation may not be the most appropriate dispute resolution process, since these differences often lead to negative outcomes. However, by taking these cultural differences into account, by understanding and explaining them during mediation, the parties can still manage to find grounds for an agreement, and reach a successful outcome, with the help of a cross-culturally trained mediator.

V. Cultural Issues for Cross-Border Mediation

Every individual or group of individuals has a different way of negotiating, which can be explained by many different factors. However, the predominant factor that explains these differences is the cultural background of each negotiator. Cultural differences will thus play a significant role in cross-border mediation, especially if the parties come from very different cultures. It is therefore important to explore cultural issues for cross-border mediation by first defining what culture is, then by analyzing the main elements of cultural divergences, and finally proposing solutions in order to get past the cultural barriers to settlement.

A. What Is Culture?

Unfortunately there is no one way to define culture, since the true meaning of this concept is not set in stone. There have been over years numerous definitions of culture. Some define culture as including all aspects of a person's values, beliefs, perceptions and behaviors; others suggest that culture "only includes a person's thought process;"[68] and, finally, culture has also been defined as "the integrated system of learned behavior patterns which are characteristic of the members of a society, and which are not the result of biological inheritance."[69]

These different definitions seem to open the possibility that no two individuals are alike, which adds another challenge when mediators enter into a "cross-cultural" mediation, because according to this idea, every mediation can be seen as "cross-cultural."[70] Thus mediators must be able to identify the different particularities of each culture in order to deal with them in a constructive way when cultural differences arise as barriers to settlement.

B. Cultural Elements to Take into Consideration When Mediating Internationally

In spite of the fact that there is no simple way to define culture, it is safe to say that a person's culture may have an impact on that person's attitudes toward and during a mediation.[71] Indeed, due to cultural differences, there is no guarantee that what one party is trying to communicate will be interpreted in the intended manner by the other party, if the other party is from a different culture. The major elements, which need to be explained in order to then propose solutions to go past cultural barriers, are those identified by Edward T. Hall, Geert Hofstede, and Jeswald Salacuse.

1. Edward T. Hall's High/Low Context Communication

High/low context communication was pioneered by Edward Hall, and is probably the most important cultural difference that one can encounter during cross-border mediation. According to Hall, in low context cultures, people communicate directly, explicitly and rely heavily on straightforward verbal communication. In this type of communication, important issues are discussed openly, no matter how sensitive the subject is.[72] Low context cultures are more present in the United States, Canada, Australia, and most of Northern and Western Europe, where direct and explicit communication is used.

High context cultures, however, communicate in a way that the information will lie in the context, and is not always verbal. In this type of culture, the talk tends to go around the point. High context cultures value tradition and the past; they also usually feel strong links to the community, and the common knowledge shared by the community is for the culture the key to deciphering high context communications that are not explicit. Asian countries, along with most of the rest of the world not listed above, use indirect, implicit, high context communication.[73]

Professor Raymond Cohen has described how high/low context difference can negatively impact on mediation, and he points out that American negotiators, for example, tend to be surprised by their interlocutor's preoccupation with history and hierarchy, and preference for principle over detail. He also describes how Americans can get frustrated by opposing parties in mediation when they are reluctant to "put their cards on the table," or when they are evasive or dilatory. On the other hand, non-western parties can be surprised at the opposing party's ignorance of history, preoccupation with individual rights, excessive bluntness, constant generation of proposals and the inability to leave a problem pending. They can be frustrated by the opposing parties' occasional obtuseness and insensitivity, readiness for confrontation and inability to take no for an answer.[74] It becomes clear that during mediation, the high/low context issue arising from cultural differences can be a serious barrier to settlement, and will need to be addressed by the mediator in order to make the process a success.

2. Geert Hofstede's Four Dimensions Related to Cultural Differences

The first dimension identified by Hofstede is the power distance index (PDI). According to Hofstede, a lower power distance culture will value equalization of power and competence over seniority.[75] This PDI can also be assimilated to a measure of hierarchy. Indeed, status will be very important in a high power distance culture, and inequalities in society are expected and even desired.[76] In low PDI cultures, however, there is a stress on equality and opportunity for all. In such a culture, there is less dependence on superiors and more interdependence between people.[77] Hofstede's studies have shown that wealthier countries and countries from northern latitudes tend to have a low PDI, whereas most Asian, Latin and South American and Arab countries tend to have a higher PDI. Needless to say, those from different cultures with different PDIs can easily develop conflicts regarding status, deference and respect, which can be significant barriers during mediation.

The second dimension is that of individualism versus collectivism. In an individualistic culture, individual needs and independence are valued over the community's needs. In individualist cultures, individual interests prevail over those of the group,[78] whereas in collectivist cultures, individuals act as members of a group and put the interest of the group or organization before their own personal needs. Americans and Europeans are generally more individualistic, whereas Asians tend to be more collectivist. During mediation, these differences can be a barrier to settlement because opposing parties might be in a situation where they are seeking to satisfy very different interests. An illustration would be that individualists focus primarily on reaching a settlement agreement that the parties will sign, but collectivists will be more interested in maintaining a business relationship with the group that used to be their commercial partners.[79] In sum, in individualistic cultures, the negotiation task prevails over the relationship, and in collectivist cultures the relationship prevails over the task.[80]

Another dimension identified by Hofstede has to do with what he calls "gender." This issue relates to whether the culture is more "masculine," in that it values asser-

tiveness, competitiveness, and independence, or whether the culture is more "feminine," in that it values nurturing, cooperation and relationship.[81] This distinction, which can be considered sexist, can equally be defined as assertiveness versus cooperativeness. A culture of assertiveness will value achievement, control, power, money, aggressiveness, dominance, challenge, ambition and competition, and can be summarized in the phrase "to win at all costs."[82] Countries which have a tendency to be more assertive are Japan, Switzerland, Mexico and the Arab world, whereas the Scandinavian countries, as well as Thailand and South Korea, tend to be the most cooperative. The United States, as well as most European countries, seem to be in mid-scale, according to Hofstede's research.[83] This cultural difference may have a great impact on mediation, since assertive negotiators will attempt to dominate the other through power tactics and will be reluctant to make concessions, in opposition to cooperative negotiators, who will prefer to discuss interests, offer concessions and be willing to consider the dispute in a more neutral way to maximize the chances of settlement.

The final dimension defined by Hofstede's model is whether people in a culture are prone to avoid risks or to take risks. Risk avoiders tend to dislike risky and unclear situations, while risk takers will be more open to new ideas and to be creative in their problem solving approach.[84]

Negotiators from cultures that value risk aversion will prefer to keep the mediation structured, and will always follow the ground rules set forth by the mediator, since they are usually not comfortable in unconventional situations. They tend to value precision, and leave very little to chance. Countries which have a culture of high risk aversion are Greece, Portugal, Japan, Spain, Mexico and Belgium.[85] Cultures which tend to have a higher tendency to embrace risks, such as in the United States, England, Hong Kong, Sweden, Denmark and Singapore, usually tolerate uncertainty: they are less rule-oriented and are open to new situations.

This factor can be very important during a cross-border mediation, since there is the chance that the parties will find trouble cooperating if one is constantly proposing new options toward settlement and the other is unwilling to change its position, or to consider more creative solutions to the dispute. In addition, it is worth mentioning that, generally, risk avoiders are driven by fear of failure, whereas risk takers are motivated by the hope of success.[86]

3. Jeswald Salacuse's Approach to Cultural Differences When Negotiating

The last author who needs to be discussed in order to fully grasp the extent of the impact cultural differences have over mediation in a context of cross-border commercial disputes is Jeswald Salacuse.

Salacuse identifies ten ways that culture could impede reaching an agreement.

The first element pertains to the negotiation goal, and whether the parties focus on the contractual aspect of the dispute, or on the relationship they have had with the other party. Americans tend to insist more on the contractual relation, while the Japanese, for example, focus more on the relationship. This can lead to barriers during the mediation, as one party might see it as a sign of lack of trust if one party is insisting on detailing all the provisions in a contract, while the other party may feel as if the opposition wants to escape its obligations by not putting every aspect of the agreement into a contract.[87]

The next issue concerns the negotiating attitude. Some parties will have a win-win approach to the settlement negotiations, while other parties will have more of a win-lose approach.[88] It will therefore be up to the mediator to make sure all parties are clear about what the process is about, so that the mediation can still be constructive.

Salacuse also mentions the formality aspect of the mediation. Indeed, some cultures, such as in the United States, find it normal to call each other by first names, or behave or dress in a casual manner. However, in other cultures, such as in France, Japan or Egypt, for example, this lack of formality will be seen as a sign of disrespect,[89] and will greatly hinder the mediation.

Another point is that of direct or indirect communication, as discussed above.

Depending on their culture, Salacuse also explains that parties might not have the same sensitivity to time. For example, Americans are usually perfectly on time: they reduce formalities to get down to business quickly,[90] and decide rapidly on the closing of an agreement, whereas in Japan, negotiations are taken slowly. Some parties will feel that spending time in mediation strengthens the relationship between the parties, which is an important factor when two business partners are in mediation to settle a dispute but still want to maintain some kind of commercial relation, while others will see the extra time spent in mediation as a waste.[91] These different perceptions, if not expressed and explained, can also be barriers to settlement.

Emotion is an additional factor that can come into play during mediation, and can be either a liberating element for a party which will permit it to mediate more openly, or it can be a hindrance. Some cultures, particularly in Latin America, tend to show their emotions during mediation, whereas others, such as in Japan, hide their emotions at the bargaining table.[92] Unfortunately, for

some more reserved cultures, showing emotion might be interpreted as a sign of aggression.

Also, Salacuse points out the element of the form of the agreements, whether it be a general one or a more specific one. Americans tend to desire a lot of detail in their agreements, providing for a legal remedy for any possible solution, whether predictable or not, while in China, for example, parties will prefer a more general contract, with the intent of maintaining a future business being the guarantee to the execution of the unwritten mutually accepted obligations. However, the American view is often seen by the Chinese as a sign of not wanting to maintain a long-term relationship, which can cause serious damage to the mediation process.

Another element put forth in the author's research is the way to build the agreement. Indeed, some cultures tend to build an agreement from the top down while others build it from bottom up. Americans, for example, like to build a settlement agreement from bottom up, discussing each and every issue step by step, one after the other, while in France, for example, negotiators tend to aim for a general framework agreement, and in a second phase will fill in the specific issues that need to be covered.[93]

Another aspect that can impede a settlement agreement is the way the parties are organized. Indeed, in some cultures, there is only one leader who will make the decisive decisions, while in other cultures, for a proposal to be accepted, it has to be agreed to by a group consensus.[94] The American style is that there is generally one person with the authority to negotiate, while in Japan, for example, there is often a delegation of negotiators who do not necessarily have full authority to negotiate, and must refer to a company hierarchy for final approval once the delegation itself has agreed to the proposal. These differences can be misinterpreted by parties, since Americans sometime believe the Japanese counterparty is not taking the negotiation seriously if they are not able to settle the dispute themselves.

Finally Salacuse describes the element of risk, which has already been discussed above.

With the study of all these different factors which can come into play during a cross-border mediation, it may seem that these differences cannot be overcome, and that mediation is maybe not the best solution to deal with these types of international commercial disputes that involve cross-cultural issues. However, where direct negotiations between very different parties have a significant chance of failure, mediation on the other hand can still be effective, since the parties are assisted by a mediator, who can use his knowledge in inter-cultural differences to get past these seemingly overwhelming barriers and facilitate the negotiations so that an acceptable settlement agreement is reached.

C. Getting Past Cultural Barriers Toward Settlement

It should now be clear that cross-cultural mediation is more challenging than domestic mediation because of the numerous cultural differences the parties will face during the process. Nevertheless, with good preparation, by keeping an open mind, and by communicating these differences, the mediator can still help the parties reach a mediated settlement agreement.

1. Good Preparation

Cross-cultural mediation can only be successful if both parties and especially the mediator prepare for the process thoroughly. Part of this preparation will involve learning about the culture of the parties before entering into the mediation itself: that is, familiarizing oneself with the stereotypes about the culturally different parties who will be present.[95] Another element of the preparation will involve investigating the people who will be present, as well as the problem itself. The goal is to try to understand beforehand how each person feels about the problem, and how each person views the dispute. In addition, collecting all available information concerning the different cultural differences will help understand each person's behavior during the mediation, and ultimately smooth the process.

Mediator Julie Barker listed the top ten elements that she uses when dealing with inter-cultural mediation, and some of these include learning not only to recognize how culture affects bargaining tactics and positions, but also how to respond accordingly. Another very important element she points out is the need to do some research in order to understand the importance some cultures give to non-business factors such as family, religion, and historical influences. She also points out that, when preparing for mediation, the mediator should know some basics of the counterparts' languages, and if the mediator is not comfortable enough in that language, to choose a trusted interpreter who is very capable.

Raymond Cohen also made a top-ten list of elements that should be taken into consideration when dealing with a cross-cultural mediation, and he equally insists on learning each party's culture and history, in addition to understanding thoroughly the problem at hand. Moreover, he points out that the mediator should spend time before the mediation to create a warm and personal relationship with the parties he will be assisting during the mediation.

2. Keeping an Open Mind

The best quality a mediator can bring to a cross-cultural international commercial mediation is having an open mind. This is harder to apply than one might think, because the mediator will necessarily have been brought up in one particular culture, and the mediator must manage to detach himself or herself from that culture to be able to embrace all the cultures present during mediation

without being judgmental or acting solely based on cultural stereotypes. That is no easy task.

Keeping an open mind can refer to many things, one of which is to be conscious of one's own behaviors and predisposition, and what impact they can have on the parties.[96] It also can mean not to assume that what one has said is being understood, or that one understands what has just been said.[97]

An open mind will also be aware of the words and contexts surrounding the mediation, in addition to the indirect formulations and non-verbal gestures. This will require the mediator to read between the lines.

Mediators help parties come to an agreement with even greater success if the mediators learn to identify all the cultural elements listed in the previous section, and act in accordance with the approach each party has to them. For example, the mediator should not be surprised if the parties decide to continue the mediation even after an agreement has been reached, and should pay great attention to politeness, status, and deference.

Keeping an open mind before and during the mediation will allow the mediator to adapt to each party's cultural background, which will create a relationship of trust between the two, an essential element for the success of the process. Moreover, by being open, the mediator will be able to adapt instantly to one party or to another, and therefore facilitate communication between the parties.

3. The Importance of Communication

The mediator must be sufficiently knowledgeable and comfortable with the cultural differences present at the mediation, and be able to act as a cultural translator from one party to another, to avoid one of them being offended or frightened by what one would consider to be abnormal in their own culture.

What the mediator can do in order for the parties to communicate effectively, despite the cultural differences they might have, is to explain these cultural differences to both parties, preferably during a caucus. This will have the effect of warning the parties of what they should expect, and reassuring them that the other party is in fact not trying to bully, insult, or show them disrespect. If the mediator manages to "cushion the cultural blows" between the parties,[98] the mediator will increase the chances of success, since the parties may be able to get past these cultural differences that they will now understand in order to focus on solving the dispute at hand.

Communication is often the key to a successful mediation, because by communicating the parties and the mediator can create rapport, exchange information about one another, and, without even realizing it, develop their relationship. The mediator must be a catalyst of communication, who can intervene to explain, reframe or question what has been said for the sake of clarity. The importance of communication has even more impact in a cross-cultural mediation, since there will be at least two levels of communication, the factual and the cultural, which the mediator must be able to understand and explain so that the parties are on the same page, and are going in the same direction toward a settlement. Moreover, the mediator must defuse any problem arising from a misinterpretation or misunderstanding due to cultural differences. The mediator must always reassure the parties that the "problem" is not personal, but rather simply a different approach to a situation that can often be rationalized and can be put aside, since it does not have anything to do with *what* is actually being negotiated, but rather concerns *how* it is being negotiated.

Cross-border commercial mediation is clearly more complex than any type of domestic mediation, particularly if the parties come from different cultures. However, it has also been shown that it is possible to overcome this complexity and find solutions to overcome barriers to settlement, and reach an agreement that the parties will be comfortable with.

VI. The Future of International Conflict Settlement

After having discussed mediation, how it is regulated and how it can be used to solve cross-border commercial disputes effectively, it seems clear that this dispute resolution process can play a significant role on the stage of dispute resolution. Mediation definitely has its strengths, which parties are increasingly experiencing. As a result, new uses of mediation are emerging. In addition, in order to ensure that mediation continues to play such an important role in international conflict settlement, more guarantees are being given to the parties in relation to the process. And, finally, due to the obvious evolution of the way settlements are increasingly being reached, both lawyers and mediators must adapt to the future of dispute resolution.

A. New Ways to Use Mediation in a Cross-Border Dispute

Parties are beginning to understand that mediation can effectively help them resolve their disputes, while saving them time and expense. Therefore, some parties are now using mediation as part of a larger dispute resolution process, particularly in international commercial disputes, and relaxing the formality of arbitration by mixing some elements of mediation into it.

1. Negotiation-Mediation-Arbitration

This three-step method for solving international conflicts is being applied even more frequently, since it allows parties to take advantage of trying mediation if their direct negotiations fail, while still permitting them to go to arbitration afterwards if the mediation is unsuccessful.

Using mediation before arbitration has a dual advantage: it will offer the parties the possibility of reaching a settlement agreement before having spent the money and time they would spend in arbitration; and it also permits the parties to use mediation to filter the dispute, and settle certain issues that they do not want to leave in the hands of an arbitrator, but rather wish to settle themselves. Indeed, mediation can definitely be used as a filter,[99] so that part of the dispute is settled during mediation, whereas the fundamental issues of law, for example, are left for an arbitral tribunal to decide. As mentioned previously, mediation will go only as far as the parties are willing to take it, and if they want to decide to mediate only certain aspects of their dispute, they are perfectly free to do so, and can still be assured that some other elements will be decided by an arbitrator. Some might argue that, if the parties are planning on going to arbitration anyway, then what is the use of going to mediation, since in any case the arbitrator would have decided on all matters that the parties submit? The first reason is that settling on part of a dispute will save time and expenses for the arbitration, since those elements will not have to be heard during arbitration. In addition, parties may wish to settle the very intricate technical business aspects of the disputes between themselves, while leaving the more general legal implications to the consideration of the arbitral tribunal.

In addition to using mediation as a filter before arbitration, parties are increasingly using a mixed process of mediation and arbitration.

2. Med-Arb

Med-Arb is a process which is gaining a lot of popularity, since it is a process by which the arbitrator can in turn act either as an arbitrator or a mediator during the same procedure. The advantages of this are that often parties can come to an agreement on certain elements of a dispute, and the arbitrator can therefore easily function as a mediator, solve those specific elements, and incorporate the mediated outcome into the arbitral award that will be rendered at the end of the process. In this sense, the arbitrator can hear both sides of the case during an adversarial hearing with presentation of legal evidence, and when he has had sufficient information about the issues at hand he can change his role into that of a mediator, to help the parties reach a settlement, on either part of or the whole of the dispute if possible.[100] In China, this mechanism is even provided for in the China International Economic and Trade Arbitration Commission Arbitration Rules, which state that "where both parties have the desire for conciliation,[…]the arbitral tribunal may conciliate the case during the course of the arbitration proceedings,[…] where the conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an award."[101]

These new uses of mediation, such as the integration of mediation into more traditional methods of resolving conflicts, show how beneficial the mediation process can be when the parties are faced with a dispute. Nevertheless, since cross-border commercial mediation, albeit growing at a rapid rate, is still in the early stages of its development compared to international commercial arbitration, certain guarantees need to be given to the parties for them to feel confident in using the process.

B. Future Guarantees for the Parties

Two main guarantees can be given to parties in relation to mediation: the adoption by mediators of professional codes of conduct; and the existence of minimum legal standards which protect the rights of the parties.

1. Professional Codes of Conduct

In 2005, the European Union published a European Code of Conduct for Mediators, which sets out a number of principles to which individual mediators can voluntarily commit. Some of the principles covered by this code relate to competence, appointment and advertising of mediators' services, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process and finally fees and the confidentiality of the process.[102] By a mediator adopting this code of conduct, even though it is not enforceable in the event of a violation by the mediator, parties should feel more confident in the mediation process. Indeed, from a business perspective, the mediator has all the reasons to abide by the Code if the underwriter still wants to practice mediation, since a mediator who violates the code of conduct will acquire a bad reputation and is risking his or her entire mediation career.

Another way to guarantee the competence of the mediators is by selecting the mediators from a recognized mediation institution. The International Mediation Institute,[103] for example, provides parties with a list of certified mediators whose competence has been verified, who must continue their mediation education to stay certified, and who commit to a professional code of conduct which is available online. By selecting mediators from an institution such as this one, the parties can be confident about the competence of the mediator.

2. Minimum Legal Standards

In addition to providing the parties with the guarantee that mediators will abide by a code of conduct, many countries, as we have seen above, are now legislating on matters of mediation. These usually new laws provide minimum legal standards that can be enforced by a court, and should reassure the parties of the fact that their essential rights are protected.[104] As was shown in the section on the regulation of mediation, even though the mediation process is still not harmonized, there have been some international attempts to regulate it, in order to guarantee that the parties are entitled to a minimum legal standard of protection when they are using mediation, which

should definitely contribute to the further development of this method of dispute resolution.

Although professional codes of conduct and minimum legal standards provide guarantees for the quality of the process, the effectiveness of mediation also requires both lawyers and mediators to adapt their respective role, particularly when faced with a cross-border commercial mediation.

C. The Modern Lawyer

With the increasing use of alternative dispute resolution methods, including mediation, but also of settlement in general, the legal profession must adapt to the modern practices in order to best satisfy clients.

The traditional role of the lawyer was to be a legal expert on the technicalities of the law; he had to be adversarial and able to represent and defend adequately his client, even if that meant threatening the other party into giving in. The defense of the client was to be done at all costs, and costs were often unimaginably high.[105]

Lawyers tend still to have this mind frame that winning a case means crushing the other party, or at least having them lose. Lawyers of the past generation took pride in being sharks, aggressive to a point that even other lawyers who believed in their adversarial role feared to face them in court. However, such a lawyer can only be comfortable in an adjudication situation, and taking the recent average settlement rate of ninety-two percent into account, this would mean that these lawyers are really only effective in an average of eight percent of disputes.

In order to satisfy clients' needs, the modern lawyer must adopt a whole new perspective of conflict and of the opposing party. Indeed, the modern lawyer needs to be a legal entrepreneur, always in search of the best possible overall deal for his or her client; the modern lawyer must be open minded and welcome new ideas and alternative means of representing a client in a dispute, so that his or her role fits the current demands of the legal market. And the legal market today needs more cooperative lawyers and fewer aggressive lawyers: it needs lawyers who can focus on generating value instead of crushing an opponent.[106]

The 21st century lawyer must be able to represent his or her client while taking time, cost and energy into consideration, and must be a proficient negotiator in addition to being able to support his or her clients' legal claims before a court. The quest of a chance of winning in court must be replaced by the search for a solution that will be more beneficial for the client, even if this means making concessions in order to improve the odds of reaching an agreement which will satisfy the client, while avoiding spending incredible amounts of money and time in a legal proceeding.

In addition, in this era of globalization, disputes are increasingly international, and despite the often domestic legal education lawyers have, they must be knowledgeable in foreign legal systems, speak multiple languages, and understand cross-cultural differences, so that they can be the most effective when representing the interests of a client.

The face of the legal profession has changed with new methods such as mediation, and the lawyers will have no other choice but to adapt to this change.

D. The Modern Mediator

In the same way that the role of the lawyers must adapt to the globalization of disputes, mediators must also be able to respond to the new needs of the international legal market. Particularly in the aspect of cross-border commercial disputes, mediators must be trained in business technicalities in order to understand the commercial issues at hand, but also need to be able to identify and deal with cultural differences if they intend to make mediation a success.

Moreover, in spite of the fact that mediation has not yet become completely harmonized like arbitration, modern mediators must commit to professional codes of conduct and always satisfy the constantly increasing legal requirements called for by both domestic and international regulations. In doing so, mediators are ensuring the sustainability of mediation, by constantly aiming for party satisfaction, so that they will keep trying mediation.

VII. Conclusion

In conclusion, one can say that, even though mediation in cross-border matters is still in its infancy,[107] it has great potential. Indeed, mediation is now a process which is very well defined, both domestically and now internationally, and can be used to solve any type of commercial dispute, as long as the parties decide to turn to it, either consensually or by including a mediation clause in their contracts.

Mediation currently has many advantages to offer. The main advantages are that the process is faster and less costly, while empowering the parties with control over the process itself and the outcome. Indeed, the mediated settlement agreement can provide for a much wider variety of remedies than those available in court or arbitration.

The progressive regulation of mediation, both at state levels as well as on international levels, including the European Directive on certain aspects of mediation in civil and commercial matters and the UNCITRAL conciliation rules, will only make mediation a stronger and more reliable tool for the parties, by providing, for example, for settlement agreements to be recognized and enforced by state courts just as arbitral awards currently are.

It is true that mediation does have some disadvantages, which must not be overlooked. Nevertheless, the success rates of mediation as well as the satisfaction rates of the parties tend to prove that, despite these disadvantages, mediation is becoming the method of choice for solving disputes.

In regard to the cross-border aspect of mediation, the greatest challenge of this new solution is for it to find its place in the current international legal framework. This seems to be taking place, here again with the initiatives of international institutions and organizations.

One must not forget to mention the impact of cultural differences when dealing with cross-border commercial disputes, but even though it may seem as if some of these differences are unfathomable barriers to settlement, we have seen that it is still possible to overcome them and avoid an impasse. Cross-border mediation is reshaping the face of international dispute settlement, and this suggests that both lawyers and mediators need to adapt to this evolution, in order to provide the best possible services to clients or parties in terms of representation and facilitation.

For all the reasons presented in this analysis, cross-border mediation is now a dispute resolution method to be reckoned with, which has shown both its suitability and effectiveness in matters of international commercial disputes.

Endnotes

1. Connerty, *Developments in cross-border mediation: The use of mediation as part of a "filter" process in cross-border disputes*, Address at First Asian Mediation Association Corporation, Singapore (June 2009).
2. Eidenmüller and Griffiths, *Mediation in Cross-Border Insolvency Procedures—The practitioner's resort of choice in disputes concerning insolvent undertakings*, Global Forensics 10-11 (November/December 2008).
3. Harold Abramson, in his article *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 Cardozo J. Conflict Resolution 253 (2006), lists six different adjectives that can describe different mediation styles: the self-determination approach of mediation; transformative mediation; evaluative mediation; evaluatively directive mediation; wisely directive; and authoritatively directive mediation.
4. *Id.*
5. *Id.*
6. The power for mediators to give recommendations and make proposals of their own has been adopted in the American Arbitration Association International Dispute Resolution Procedures.
7. Alexander, *What's Law Got to Do with It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 Bond Law Review Article 5 (Issue 2: 2001).
8. Murray, *The Cairo Stories: Some Reflections on Conflict Resolution in Egypt*, 13 Negot. J. 39 (1997).
9. Connerty, *The Role of ADR in the Resolution of International Disputes*, 12 Arb. Int'l 47 (1996).
10. Rosu, *International Regulations Dealing with Alternative Dispute Resolution for International Commercial Disputes*, 4 EIRP Proceedings 443 (2009), *available at* http://www.journals.univ-danubius.ro/index.php/eirp/article/viewFile/471/441.
11. There are, however, some exceptions to this privilege, such as: in case of threats of physical injury during the mediation session; abuse of negligence by persons needing protection; and the use of mediation for criminal purposes.
12. Heijmans and Plasschaert, *Effective Cross-Border Mediation in Europe*, Association of Corporate Council Docket, European Briefing (June 2006).
13. Brett, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 Negot. J. 259, 261 (1996), which found that the average settlement rate by mediation was seventy-eight percent.
14. Christian Duve, *Civil and Commercial Mediation in the European Union, The Settlement of Disputes from a German Lawyer's Perspective, available at* http://www.google.pt/url?sa=t&source=web&cd=71&ved=0CBcQFjAAOEY&url=http%3A%2F%2Fwww.ajag.org%2FAJAG%2Flib%2Fexe%2Ffetch.php%2Fajag%2Fvortrag_dr._duve.pdf%3Fid%3Dajag%253A11_kongress%26cache%3Dcache&rct=j&q=christian%20duve%20mediation&ei=DnViTIGnM4iR4gajuDgCg&usg=AFQjCNGeq_Go-zrBgZgGk_MsepnDuOTSIA.
15. Tochtermann, *Agreements to Negotiate in the Transnational Context—Issues of Contract Law and Effective Dispute Resolution*, 3 Uniform L. Rev. 658 (2008).
16. De Palo, *Cross-Border Commercial Mediation: How Legislation Affects Mediation Use*, presentation to the European Parliament (2007), *available at* http://www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5_en.pdf.
17. *Id.*
18. Brady, *Mediation Developments in Civil and Commercial Matters within the European Union*, 75, No. 3, Int'l J. Arb., Mediation, and Dispute Management 390 (2009).
19. *Halsey v. Milton Keynes General NHS Trust*, (2004) EWCA 3006 (Civ 576).
20. Heijmans and Plasschaert, note 12 *supra*.
21. *Id.*
22. *Cour de Cassation*, 23 January 2001 and 6 March 2001, commented by Jarrosson in the (2001) Revue de l'Arbitrage 749.
23. *Cour de Cassation, Chambre Mixte*, 14 February 2003, commented by Jarrosson in the (2003) Revue de l'Arbitrage 403.
24. Rosu, note 10 *supra*.
25. *Id.* In the author's opinion, there is no real distinction between conciliation and mediation.
26. Connerty, note 1 *supra*.
27. Duve, note 14 *supra.*
28. Rosu, note 10 *supra.*
29. *Id.*
30. With the exception of Denmark, which has not adopted the Directive.
31. Philips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, *available at* http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf.
32. *Id.*
33. *Id.*
34. Brady, note 18 *supra*.
35. Directive 2008/52/EC of the European Parliament of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (hereinafter "Directive") Article 4.

36. Articles 5, 9 and 10 of the Directive.
37. Article 6 of the Directive.
38. Article 7 of the Directive.
39. Article 8 of the Directive.
40. Philips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, *available at* http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf.
41. *Id.*
42. Howell-Richardson, *Europe's changing mediation landscape*, S.J. Berwin LLP, The In-House Lawyer (July-August 2008).
43. Philips, note 40 *supra*.
44. *Id.*
45. Rosu, note 10 *supra.*
46. Brady, note 18, *supra*.
47. Blanke, *The Mediation Directive: What Will it Mean for Us?*, 74 Arbitration 441-443 (2008).
48. However, some countries have provided legal provisions which stay legal proceedings when settlement negotiations are taking place between parties.
49. An arbitration award can be recognized and enforced locally by state courts without being subject to review (except under certain specific and limited circumstances) through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which has been signed and ratified by 142 states.
50. Martin, *International Mediation: An Evolving Market*, in Arthur W. Ravine, ed., Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010) at 404 (2011), *available at* www.adrgovernance.com (June 2010).
51. Herbert Smith LLP., The Inside Track: How Blue Chips Are Using ADR (November 2007).
52. Chart taken from Martin, note 50 *supra*, at 408.
53. *Id.*
54. The research report of this survey is *available at* http://www.adr.org/si.asp?id=4124.
55. Posin, *Mediating International Business Disputes*, 9 Ford. J. Corp. & Finan. L. 449 (2004).
56. *Id.*
57. Wagatsuma & Roset, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Society Rev. 461 (1986).
58. Brady, note 18 *supra*.
59. http://www.mediation.com.sg/Med-Arb_Service.htm.
60. Connerty, note 1 *supra*.
61. *Id.*, in reference to http://www.mediation.com.sg/Med-Arb_Service.htm.
62. Connerty, note 1 *supra*.
63. Brett, note 13 *supra*, 12 Negot. J. at 261.
64. Eidenmüller and Griffiths, note 2 *supra*.
65. Brett, note 13 *supra*, 12 Negot. J. at 261.
66. Posin, note 55 *supra*, 9 Ford. J. Corp & Finan. L. at 451.
67. http://www.adr.org/si.asp?id=4124.
68. Savage, *Culture and Mediation: A Red Herring*, 5 Amer. Univ. J. Gender Soc. Policy & Law 269 (1996).
69. E. Adamson Hoebel, Anthropology: The Study Of Man (4th ed. 1972).
70. Sim Khadijah Binte Mohammed, *Do You Hear Me Clearly From Over There? Communicating on Different Planes in Cross-Culture Mediation*, Address at First Asian Mediation Association Conference, Singapore (June 2009).
71. *Id.*
72. Barkai, *What's a Cross-Cultural Mediator to Do? A Low Context Solution for a High Context Problem*, 10 Cardozo J. Conflict Resolution 43 (2008).
73. *Id.*
74. Raymond Cohen, Negotiating Across Cultures: International Communication in an Interdependent World (1997).
75. Posin, note 55 *supra*, 9 Ford. J. Corp. & Finan. L. at 466 (2004).
76. Barkai, note 72 *supra*, 10 Cardozo J. Conflict Resolution at 63.
77. *Id.*
78. *Id.*
79. *Id.*
80. Yoshihiro Sano & John Graham, Doing Business In The New Japan (2000).
81. Posin, note 55 *supra*, 9 Ford. J. Corp. & Finan. L. at 466.
82. *Id.*
83. Geert Hofstede, Cultures and Organizations: Software of the Mind (2005).
84. Posin, note 55 *supra*, 9 Ford. J. Corp. & Finan. L. at 466.
85. Hofstede, note 83 *supra*.
86. Geert Hofstede, Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations Across Nations (2d ed. 2001).
87. Jeswald Salacuse, Making Global Deals: What Every Executive Should Know About Negotiating Abroad (1991).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. Barkai, note 72 *supra*, 10 Cardozo J. Conflict Resolution at 55.
96. Laurence Boulle, Mediation: Principles, Process, Practice (2d. ed. 2005).
97. Mark D. Bennett & Michele S. G. Herman, The Art Of Mediation (1996).
98. Mohammed, note 70 *supra*.
99. Connerty, note 1 *supra*.
100. *Id.*
101. *Id.* Reference to the CIETQC rules can be found online at http://www.cietac.org/index.cms.
102. Brady, note 18 *supra*.
103. http://www.imimediation.org/.
104. The right to go to trial if the mediation fails, for example, is set forth in the European Directive on matters of civil and commercial mediation in its article 8, which must be transposed by member states before May 2011.
105. Richard Susskind, The End of Lawyers (2008).
106. *Id.*
107. Eidenmüller and Griffiths, note 2 *supra*.

Private Mergers and Acquisitions—Global Trends in Buyer Protection

By Ana Sofia Batista, Carl-Olof E. Bouveng, Wayne D. Gray, Abhijit Joshi, Gregory E. Ostling and Ronaldo C. Veirano

I. Introduction

In this article, we focus on five issues of relevance in negotiating a purchase agreement for the acquisition of a business and, in particular, provisions protecting the buyer against deficiencies in the business acquired. The issues are discussed against the background of differences in the practice in certain countries and also how the use of certain provisions may vary over time. As regards four of the issues, studies relating to the issues have been made by the American Bar Association ("ABA") and such studies are therefore referred to in the discussion below.

Specifically, we discuss: (1) the allocation of certain risks between signing and closing; (2) the use of sandbagging provisions; (3) the survival time of representations and warranties; (4) indemnity baskets, deductibles and caps; and (5) the use of escrow, holdbacks, bank guarantees and representation and warranty insurance.

II. Allocation of Certain Risks Between Signing and Closing

A number of matters are customarily resolved between signing and closing. In particular, these may include filings for governmental approval under regulatory (including antitrust merger) regimes. Also, financing may need to be obtained. The failure to satisfy these requirements may well jeopardize the deal.

The common element is that the closing risks relating to financing or antitrust generally do not exist in the abstract—meaning that they are both linked to the seller's views as to its negotiating options and the price differential between the prospective buyer's offer and the next best offer to buy. If, for example, the seller is in a situation where the price on the table is materially better than one without the same closing risks, the seller may well be prepared to invest the time and effort it takes to see whether the favoured transaction will close. If the price is high and the risk low, it may be preferable to work with the buyer to close the deal rather than move to the next best offer (where the closing risks may be less than in the best-price offer). On the other hand, if the closing risk is high and the seller just wants out (for example, it expects the business to deteriorate with time), then the closing risks may well outweigh the price differential.

The bottom line is that, if the price is right, the seller will be motivated to share the closing risk (even if that risk is high). However, if the seller places more weight on the certainty of closing than on the price obtained, the buyer must adjust its bid to that reality.

A. United States

One significant development in acquisition agreements in recent years is the evolution of provisions relating to a seller's remedies for a buyer's failure to close and the allocation of risk. In U.S. deals, there are typically two areas where risk allocation is of heightened importance to the negotiating parties: regulatory and financing risk.

With respect to regulatory risk (in the United States this almost invariably means antitrust risk), parties take varying approaches depending on the level of the regulatory risk and the negotiation dynamic. Sometimes a buyer, in order to give the seller maximum comfort that the deal will close despite a high risk of antitrust opposition, will agree to what is known as a "hell or high water" provision, in which the buyer agrees to do virtually anything (divestitures, litigation and/or licensing of technology) in order to clear the regulatory hurdle. In other cases, buyers will negotiate for less broad divestiture requirements, oftentimes limited to non-material assets. Another alternative is the use of a regulatory "break fee," payable by the buyer in the event that regulatory authorities block the proposed deal on the basis of antitrust. The amount of these fees can be higher than typical break fees payable by the seller, and buyer break fees are not regulated and restricted by state law as seller break fees are. For instance, in Google's 2011 US$12.5 billion acquisition of Motorola Mobility, the agreement provided that if Google were to walk away from the deal, either voluntarily or because it was forced to by regulators, Google would pay to Motorola Mobility a reverse break fee in the amount of US$2.5 billion, which represented about 20% of the transaction value. This fee was significantly higher than the US$375 million straight break fee payable by Motorola Mobility if it accepted another bid.

The mechanism chosen is, at bottom, a matter of negotiation between the parties and creativity in this area is often observed, most prominently in the area of regulatory break fees. For instance, in the proposed AT&T/T-Mobile transaction, the merger agreement included provisions requiring AT&T to pay Deutsche Telekom US$3 billion and transfer spectrum rights if the deal failed to win antitrust clearance. (AT&T ultimately withdrew the deal amid regulatory opposition and paid Deutsche Telekom this fee.)

With regards to financing risk, historically speaking, private equity transactions typically included a closing condition that permitted the buyer to walk from the deal in the event that it could not obtain financing. When deal size began to swell and leveraged buyout ("LBO") financing became ever more easily available during the private equity boom of 2005 to 2007, however, sellers became more successful in eliminating the financing condition. Instead, agreements began to include a reverse break fee, payable by the buyer in the event of a failure to close due to an inability to obtain financing (and in some cases for failure to close for any reason). The reverse break fee was often the seller's sole remedy in the event that it became payable, and to buttress this construct, the acquisition agreement would often provide that the seller could not obtain specific performance of the buyer's obligation to close. Because the buyer entity that actually signed the acquisition agreement was typically just a shell company, the private equity fund would often sign a limited guarantee of the buyer's obligation to pay the reverse break fee.

Before the recent financial crisis, these reverse break fees created a sort of option contract, with the buyer afforded the choice to simply walk away from the deal and pay the reverse termination fee without having any further liability to the seller. Sellers took comfort from the fact that private equity buyers operated in an environment where reputation was of paramount importance, and a private equity fund that walked from a deal would be hard pressed to secure a future deal. After the financial crisis, however, circumstances again changed. Private equity buyers, once constrained by strong reputational concerns, began to either break the deal and pay the modest fee or use the threat of walking away as leverage to renegotiate the deal on more buyer-friendly terms. The financial crisis and credit crunch thus posed severe challenges to this paradigm.

Some practitioners, in the wake of the financial crisis, expected a paradigm shift in the break fee mechanics or the way that risk was allocated between buyer and seller, but such a shift was not observed. Sellers do now, however, demand a higher reverse break fee, which is typically 5% to 10% of the transaction value (sometimes much higher).

In addition, sellers today also limit the buyer's ability to simply walk from the deal and pay the reverse break fee. Many private equity transactions now require the buyer to use its efforts to force lenders and sponsors to deliver committed funding, and in some cases specifically require the pursuit of litigation in furtherance of this goal. However, debt commitment letters usually do not allow buyers to seek specific performance directly against lenders or name sellers as third-party beneficiaries. Lenders have in some cases sought to include provisions directly in acquisition agreements that limit their own liability (commonly referred to as "Xerox provisions," having been used in the Xerox/ACS transaction).

B. Canada

With respect to allocation of financing closing risk, the general comments above on negotiation dynamics apply to parties transacting in a Canadian context. Two recent contrasting experiences may be used to illustrate.

One case involved the purchase of a specialized pharmaceutical chain that was in receivership. In Ontario, a majority of the shares of each class in the capital of a corporate pharmacist must be owned by a licensed individual pharmacist. However, there is an exception for shares in a corporate pharmacy that pre-date a point in 1953. In this case, the target was indeed grandfathered—meaning that the buyer could be a passive investor and need not find a licensed pharmacist to be the controlling shareholder. However, the acquisition of the shares would in this case have required a bankruptcy reorganization of the target, and this would take time and entail significant closing risk. The receiver had already entered into one sale agreement that had failed to close at enormous cost and, therefore, was unwilling to entertain another new offer that entailed a material closing risk—the price differential did not matter. The receiver and its counsel, who by this point were both owed substantial unpaid fees, preferred to sell the assets to a limited pool of potential buyers at a steep discount rather than take the chance on a high price/high risk offer.

More recently, a NASDAQ-traded client successfully acquired a software company (whose only assets consisted of its proprietary software program and licence fees generated from its customer base) in a highly leveraged transaction. The client only put about C$0.8 million into the transaction and had to creatively finance the rest (almost 95% of the full price) from a syndicate of three banks and an earn-out arrangement. This deal took several months to close—including three months after signing the purchase agreement just to put the financing in place. The sellers endured and stuck with the buyer over the many months despite enormous difficulties and closing risks. Why? For no other reason than no one else came along to offer a better price than this buyer's deal.

Much the same experience applies to antitrust ("competition" in Canadian legal parlance) risk. In one case, the seller (second largest in Canada in its industry) put all the risk of closing risk on our buyer client (largest in Canada). Indeed, if the Commissioner of Competition had moved to force dissolution of the transaction (as she can do for the first year from closing under the Competition Act), the buyer was required to restore the assets for a price equal to C$1 plus the value of the real property. In this case, the buyer was prepared to accept that risk (which never materialized) rather than forgo the opportunity to make an important strategic acquisition.

More recently, a seller was party to a high-profile transaction (in the financial services sector) in which there was considerable media speculation as to how the Commissioner of Competition would eventually rule. One of the risks was that, while the Commissioner might allow the transaction to go through, it might come with restrictions applicable to the post-closing price behaviour of the merged firms. This, in turn, could result in a significant downward adjustment in the buyer's pricing model. The buyer sought to have the sellers share some of this valuation risk. Some sellers were prepared to accept a corresponding post-closing downward price adjustment (subject to arbitration). Others were not so prepared and required the buyer to take all post-closing regulatory risk (i.e., factor that risk into the offered price). Nevertheless, all parties were accommodated to their satisfaction and the deal was recently consummated.

C. Portugal

In Portugal, it is quite common that, when antitrust clearance is applied for, a decision by the Competition Authority might not be obtained prior to signing or closing of the transaction. Thus, agreements will necessarily include provisions defining the consequences to the various possible decisions of the Competition Authority. Such consequences may differ depending on the business and the parties involved. The examples included above concerning Canada and the U.S. are sometimes seen in Portugal as well, as Portugal tends to welcome solutions defined abroad and in a way tailor-make them to local transactions, more than invent solutions from scratch. This is also so because in many transactions the Portuguese entities are one of the many involved subsidiaries or branches of a group located outside of Portugal, and the structure of the transaction is defined centrally by the group and not locally.

The same rationale applies to financing risk, as financing, under the current economic and financial conditions of Portugal and Europe (and the world) in general, becomes of even higher importance and difficulty to obtain. In the last one-and-a-half to two years, a considerable number of transactions have been initiated, due diligence conducted, and then either lack of financing or unexpected problems and risks in the target or the target's business (discovered further to financial, tax and legal due diligence) have led to such transactions being aborted or postponed.

D. Sweden

In Sweden, the main contingency post-signing is clearance from competition authorities and financing. There may also be other risks—not least regulatory risks should the target be a regulated business such as a pharmaceutical business or a target in the financial sector. As indicated above, it is largely a matter of negotiation and the bargaining power of each party which determines how the risk will be allocated between the parties. Often, the buyer is obliged at least to divest of non-core business should this be required to obtain clearance from competition authorities. In principle, one may imagine a reverse break fee payable by the buyer should clearance not be obtained, but such fees are not common. It could be said to be more likely that the buyer would be subjected to a reverse break fee should the buyer fail to obtain the necessary financing.

E. India

It is fairly common in India to allocate risks between signing and closing. A large part of this is due to the regulatory regime applicable in India. India is an exchange-controlled economy. In quite a few sectors, any foreign investment or investments above a certain specified threshold require prior regulatory approval. In such sectors, almost in every case, such approvals are sought only after signing and as a condition precedent to closing. There may also be regulatory approvals required for other reasons depending on the transaction structure—such as the price being paid by the foreign investor, the time at which such price is being paid, whether the stock exchange is being accessed, etc.

The antitrust regulation in India (the Competition Act, 2002) came into full force and effect only a couple of years ago. It is now fairly established practice for parties to "notify" the regulator of a combination post-signing the acquisition agreement. Under the Competition Act, 2002, this has to be done within thirty days of execution of a binding agreement.

F. Brazil

It is not yet a common practice in Brazil to regulate in detail in the purchase agreement the responsibility of buyer and seller during the pre-closing period, nor to include reverse break-up fees in case one of the parties fails to resolve matters which should be resolved between signing and closing. More often, the parties deal with the issue by providing for a joint duty of buyer and seller to use best efforts (or at least reasonable efforts) in proceeding with the necessary steps for the successful closing of the transaction (in addition to relying on the general principle of good-faith provided under Brazilian statutory law). Therefore, although not normally expressly provided for in Brazilian M&A agreements, either seller or buyer may have a claim related to non-compliance with clearances between signing and closing before a court of law or arbitral tribunal based on the general notion of fault.

With respect to antitrust approval, it is important to note that a new Antitrust Act came into force in Brazil in 2012. Before the new statute was enacted, antitrust approval occurred post-closing, with a duty of the parties to submit the transaction to the antitrust authorities within fifteen days from the closing date. Since the analysis of the regulatory agency usually took a long time, generally any non-conformity with the antitrust law was resolved

in damages—simply because the unwinding of the deal would turn out to be impossible at the time the antitrust decision was made public.

On the other hand, with the new antitrust statute, deals must be previously submitted to the Antitrust Agency's (*Conselho Administrativo de Defesa Econômica*—CADE) control and approval prior to the closing. It is yet to be seen with a sufficient sampling basis how parties will regulate risk allocation in this new regulatory environment. However, since the new anti-trust statute forbids any interference of the buyer in the development of the target's business before antitrust clearance, the best guess is that parties will deal with the issue by establishing covenants and negative covenants which, if breached, may result in contractual remedies.

III. "Sandbagging" Provisions and How the Buyer's Knowledge Affects Claims Under Share Purchase Agreement

The buyer will, as a result of due diligence, and also through other sources, have knowledge about the target and its business. The term "sandbagging" refers to the situation where the buyer has acquired knowledge (either before signing the purchase agreement or before closing) that a specific representation or warranty of the seller is incorrect or inaccurate, but the buyer remains silent and later claims indemnification based on alleged misrepresentation or breach of warranty by the seller. In some jurisdictions, this knowledge may prevent the buyer from effectively raising a claim under contractual warranties in the purchase agreement or otherwise to hold the seller liable. In these jurisdictions, this may be the effect of law or of customary wording in the purchase agreement. The customs as to how this knowledge is handled appear to vary widely from one jurisdiction to another.

"Sandbagging" provisions are sometimes included in the agreement, either in the form of "pro-sandbagging" provisions (where the buyer's right to an indemnity for inaccuracies is explicitly stated not to be affected by any knowledge of the buyer prior to signing or closing) or "anti-sandbagging" provisions (where the buyer is disentitled to indemnity to the extent the buyer had knowledge prior to signing or closing of the inaccuracy in the seller's representation or warranty).

Again, a sandbagging provision cannot be looked at in isolation from the deal as a whole, including the purchase price and the buyer's overall comfort level. An anti-sandbagging provision may be more appropriate in some cases (such as a management buyout of a passive shareholder) than in others (such as a straightforward transaction in which the purchase agreement is meant to be the comprehensive statement of the obligations of the parties or where the buyer has a large due diligence team and, therefore, a concern with imputed knowledge).

In the Deal Points studies published by the ABA's Section of Business Law's M&A Committee, the use of sandbagging provisions may be summarized as follows:

	U.S. Study[1]	European Study[2]	Canadian Study[3]
Provisions included	46%	58%	33%
Pro-sandbagging	41%	7%	24%
Anti-sandbagging	5%	51%	9%

A. United States

The U.S. Study found that of the 100 acquisition agreements surveyed, 54% of the agreements were silent on sandbagging, while 41% of the agreements included a so-called "pro-sandbagging" provision (*i.e.*, the provision expressly states that knowledge acquired through due diligence will not affect the right to indemnification for breaches of representations, warranties and covenants) and 5% of the agreements included a so-called "anti-sandbagging" provision (*i.e.*, the provision expressly denies indemnification to a party seeking it who had knowledge of the breach for which indemnification is being sought).

At first glance, it may come as a surprise that over half of the agreements surveyed were silent on sandbagging. However, because parties to an acquisition agreement in the United States typically perform extensive pre-signing due diligence, issues about which the parties have knowledge are as a general matter expressly excluded in the acquisition agreement as possible grounds for a future claim for indemnification without the need for a typical anti-sandbagging provision. More specifically, the disclosure schedules to the acquisition agreement will set forth diligence items provided by seller to buyer (subject to negotiation between the parties). These schedules serve as express exceptions to the representations and warranties. As such, buyers may not refuse to close a transaction based on items disclosed in the disclosure schedules and may not make indemnity claims with respect to those items.

B. Canada

In Canadian common law, there is no implied term to the effect that the buyer is prohibited from claiming indemnity if it is aware of a potential claim under the purchase agreement on the date of closing. However, if the buyer is aware that a seller's representation is inaccurate at the time of signing the purchase agreement, the buyer may not be able to establish that it relied on the fact (*i.e.*, the representation or warranty) as stated by the seller. These issues have not been the subject of a definitive ju-

dicial ruling in Canada but are largely a distillation of general principles of Canadian contract law.

Against this background, the Canadian Study found anti-sandbagging provisions in 9% of the agreements. While pro-sandbagging provisions were only found in 24% of the agreements, as stated, knowledge of a misrepresentation acquired between the date of signing and the time of closing would not affect the buyer's rights to indemnification. Thus, it is fair to say that 91% of the agreements do not provide the party in breach (*i.e.*, the seller) with a sandbagging defence. By way of comparison, the U.S. Study found express sandbagging provisions more often than the same are found in Canadian agreements (U.S. 46%; CDN 33%). However, in the U.S. Study, anti-sandbagging provisions comprised a smaller proportion than in Canada (US 5%; CDN 9%); however, the gap has narrowed significantly since the 2012 Canadian Study.

While anti-sandbagging provisions are not market in Canada (given the 9% figure), they are evidently accepted more commonly than in the U.S. In one large transaction recently, an anti-sandbagging provision was accepted in the purchase agreement. Many of Canada's largest and most sophisticated financial institutions were on one side or the other of this transaction, and several major law firms were negotiating on their behalf. An anti-sandbagging provision was accepted in the unique circumstances of this transaction (where some parties were on both sides as buyers and sellers and the buyers were highly motivated and faced a competitive bid).

If the seller's counsel insists on including an anti-sandbagging provision, it is often useful to ask whether the seller is prepared to remove the non-reliance provision stating that the seller makes no representations/warranties other than those expressly set forth in the purchase agreement and that the buyer is not relying on any such representations/warranties not embodied in the text of the purchase agreement. That has made the sandbagging issue disappear in some recent negotiations. If the seller can seek to introduce external evidence as to what the buyer knew at various stages of the negotiations, perhaps the seller is also prepared to allow the buyer to do the same.

C. Portugal

In Portugal, it is common to include sandbagging provisions in the purchase agreements, especially in the form of "anti-sandbagging" provisions not entitling the buyer to indemnity to the extent the buyer had knowledge prior to signing or closing. As mentioned concerning Sweden below, it is common that also "what the purchaser should have known upon reasonable inquiries or customary due diligence" is included, serving the same purpose. Portuguese practice could be said to be consistent with European practice as reflected in the ABA's European Study.

D. Sweden

In Sweden, it would arguably follow from statutory law that a buyer is not entitled to effectively raise a claim for a "defect" or discrepancy which the buyer had knowledge of at the time of signing. However, freedom of contract applies and, if the claim is based on a warranty or other contract wording, the effect of the knowledge would largely depend on how the warranty provision, indemnities and other provisions have been drafted. For this reason, it is most customary to explicitly set out in the purchase agreement what effect the knowledge of the buyer shall have and then often a substantial amount of time is spent on negotiating the definition of "knowledge." It is probably fair to say that it is customary for anti-sandbagging provisions to be included in the purchase agreement, *i.e.*, the buyer accepts that his actual knowledge of a circumstance, and that such circumstance gives rise to a claim, will prevent such buyer from effectively making a claim. It is also not unusual that "what the buyer should have known upon reasonable inquiries or making a customary due diligence" pursuant to contractual provisions may serve to prevent an effective claim being raised.

E. India

The presence of pro-sandbagging or anti-sandbagging provisions in contracts in India is to a very large extent dictated by the negotiations between the parties. Warranties qualified only by specific disclosures are usually considered to be "fair." Anti-sandbagging provisions that qualify the warranties by any knowledge, including the data room, are not very common in Indian practice.

F. Brazil

"Sandbagging" provisions are relatively common in Brazilian deals. Frequently, one comes across a specific agreement provision dealing with the extent of the knowledge exchanged during due diligence and the deal preparation in general and how it may, or may not, affect the subsequent claims of the parties. As is the case in the United States, in Brazil, the predominance is of "pro-sandbagging" provisions, in preference to "anti-sandbagging," in purchase agreements. In fact, usually the buyer is able to include a clause in which the seller acknowledges that no investigation by, or furnishing of information to, the buyer may affect the buyer's indemnification rights under the agreement.

Although freedom of contract enables the parties to set forth a wide range of provisions, including those related to "sandbagging," some of them may have their validity challenged before a court of law or arbitral tribunal, especially if they violate cogent rules or essential legal commands, including good-faith imperatives.

IV. Survival Time of Warranties

Is the survival time of warranties fairly universally set at somewhere between twelve and twenty-four months? The answer appears be: "not everywhere."

The general survival period is typically subject to various carve-outs or exceptions. With respect to each exception, there may be no survival period or the survival period may be longer than that generally applicable to most representations/warranties. Taxes are one customary exception to the general survival time. Other exceptions are common in some jurisdictions while less common in others. Transacting parties in some jurisdictions commonly deal with gross negligence and fraud, while parties in other jurisdictions do not. Practices in specific areas such as environmental claims, intellectual property and third party claims also vary.

In the ABA Deal Points studies, the following data is found as regards survival of warranties:

(1) Survival Time

	U.S. Study	European Study	Canadian Study
Silence	3%	9%	7%
Up to 6 months	4%	1%	2%
7–12 months	25%	22%	17%
13–18 months	48%	28%	15%
19–24 months	14%	31%	49%
Above 24 months	4%	9%	8.5%

(2) Customary Carve-Outs to Survival Limitation

	U.S. Study	European Study	Canadian Study
Intentional breach	NA	27%	32%
Due organization	53%	45%	41%
Stock ownership	45%	65%	34%
Tax	72%	78%	66%
Environmental	36%	27%	28%
Intellectual property	13%	NA	Not tested
Fraud	82%	34%	66%
Capitalization	61%	NA	25%
Due authorization	74%	NA	46%
Breach of covenant	77%	NA	24%
Title to/sufficiency of assets	25%	NA	51%
No conflict/Violations	20%	NA	20%

A. United States

The U.S. Study found that most acquisition agreements provide for a 12-month survival period (25% of the acquisition agreements surveyed), an 18-month survival period (34% of the acquisition agreements surveyed) or a survival period that is between twelve and eighteen months (14% of the acquisition agreements surveyed). Twelve percent of the agreements surveyed provided for a two-year survival period. Approximately 1% of the agreements provided that the representations and warranties would survive for a period of less than six months and another 2% provided for a survival period of exactly six months.

In addition, most acquisition agreements included in the U.S. Study carved out different survival periods for specific representations and warranties that are typically longer than the general survival periods outlined above. In particular, the survival periods for representations and warranties regarding a party's capitalization, due authority and due organization (often referred to as a party's "fundamental representations") were carved out of the general survival period in 61%, 74% and 53% of the acquisition agreements surveyed, respectively. Parties to private acquisition agreements also generally carve out specific survival periods for representations and warranties on tax matters (72% of the agreements), absence of fraud (82% of the agreements), breaches of the seller/target's covenants (77% of the agreements), ownership of the shares to be transferred (45% of the agreements), broker's/finder's fees (38% of the agreements), employee benefits matters (33% of the agreements) and environmental matters (36% of the agreements). Although less frequent, parties sometimes also carve out specific survival periods for intellectual property matters (13% of the agreements), no conflicts (20% of the agreements) and title to/sufficiency of assets (25% of the agreements).

The fundamental question of how long a given survival period should be is often a focal point in negotiations, with the buyer desiring a longer period of time and the seller a shorter one. In any event, buyers usually demand that the survival period extends for at least one financial audit cycle (which is generally one year) to ensure that breaches of representations and warranties can be properly identified.

B. Canada

In Canada, a twenty-four month survival period is most common. Some carve-outs requests are also common. Others are more unusual.

By way of background, on a share purchase (53% of the transactions in the Canadian Study), a closing automatically triggers a deemed year end for the target for income tax purposes. No tax year end is triggered on an asset disposition. Corporate law provides that audits are to be completed within six months of year end. In combination, these facts mean that, within eighteen months, the target company in a share acquisition will have completed two full audits while under the buyer's ownership. However, in an asset transaction (44% of transactions in the Canadian Study), the buyer may not have completed two complete audit cycles until thirty months (2.5 years) after closing. That is the theory. Does the survey evidence support this hypothesis?

In the Canadian Study, a wide range of survival periods were reported. The shortest was six months (7% of sample survey). The Study does not say whether these were all asset transactions. The maximum was stated to be more than thirty-six months (3.5% of sample survey). The most common period chosen was twenty-four months at 47%, followed by twelve months (17%), eighteen months (26%) and thirty-six months (5%). About 9% of agreements were silent, expressed no survival or relied on the statute of limitations period. Thus, the data shows that, of those agreements that included a survival period, a survival period of twenty-four months accounted for 52%.

The most common exceptions from the general survival period are for taxes (66%), fraud (66%), title to or sufficiency of assets (51%), due authorization (46%), due organization (41%), ownership of shares (64% after adjusting to exclude asset transactions) and capitalization (47% after also adjusting to exclude asset transactions). Less common exemptions are environmental (28%), breach of covenants (24%) and no conflict or violations (20%). Perhaps surprisingly, the duration of environmental representations/warranties was only provided for separately in 28% of the purchase agreements (which may reflect the nature of the assets in the survey sample). It may be that a high proportion of targets in share transactions never held any real property (the usual occasion where environmental warranties are *de rigeur*).

Indeed, this last point can be enlarged. Without knowing more about the nature of the specific deals including in the Canadian Study, the figures on carve-outs may merely show that carve-outs are tailored to the specifics of the assets included in the transaction and that aggregate figures on carve-outs have little to say about what passes for "market" in Canada.

Clearly, survival periods and their exceptions are one of the areas that is not standard but frequently negotiated in Canadian M&A deals. That said, the parameters are well enough defined that neither the survival periods nor the carve-outs consume inordinate time in most negotiations.

Further, M&A practitioners in Canada have started to see the Canadian Study (and sometimes the U.S. Study) invoked as a tool in the negotiations if one side deviates far from the mid-point of the accepted range. It is, however, a tool that cuts both ways—as some of the survey results may help the client but others may hurt it. For example, there are, after adjustments, only four carve-outs that are found in more than 50% of Canadian purchase agreements (*viz.*, taxes, fraud, title to or sufficiency of assets and, where applicable, ownership of shares). By invoking the survey in support of tax, fraud and these other carve-outs, the buyer will necessarily undermine its arguments for the remaining carve-outs. Thus, it is important to use survey evidence with caution. For example, a lawyer may wish to avoid invoking survey results into the negotiations except (a) if opposing counsel is clearly off the charts and there is no other way of moving him or her to a more reasonable position or (b) to close on a specific sticking point.

C. Portugal

In Portugal, the survival period of warranties is commonly established between twelve to twenty-four months, even though the exact specification really depends on the circumstances of the particular transaction. Common exceptions include tax matters, where the statute of limitations tends to apply. Concerning environmental matters, warranties may also survive for a longer period, or at least for the mentioned period of between twelve and twenty-four months—however, when parties are able to determine, during the due diligence process, the extent of such environmental liability, it may rather be reflected in the purchase price.

D. Sweden

The survival period for warranties is almost always somewhere in the range of twelve to twenty-four months. The only customary exception would be for taxes, which remain the seller's liability until the statute of limitations has expired. Oddly enough, you will often see that not even a longer survival period is expressly set out for such fundamental warranties as title warranties. This is because Swedish lawyers rely on the passing of title being

of such fundamental nature that any deficiency will give right to a claim anyway. However, there may be other "fundamental warranties" where the indefinite survival is not to be taken for granted and needs to be provided for in the purchase agreement.

An extended survival period is often considered relevant for environmental and intellectual property matters, but one would rarely see other areas being made subject to a longer survival period than the general twelve to twenty-four months.

E. India

Under the general law of limitation in India, a claim for breach of contracts or warranties usually would have to be made within three years. Therefore, the survival period for warranties usually ranges between six months to three years. Tax warranties usually survive for a period of up to eight years as the tax authorities in India can re-open proceedings during that period.

The customary carve-outs in India would be the warranties relating to the title of the securities and the authority of the seller.

F. Brazil

It is fair to say that in Brazil the survival time of warranties generally comprises a wider time frame than the twelve to twenty-four months usually found in purchase agreements governed by the laws of other jurisdictions.

The survival time of warranties in Brazil takes into consideration mainly the different applicable statutes of limitation. Precisely for that reason, the relevant agreements do not indicate a unique survival period, but rather indicate a series of distinct survival periods based on the applicable statutes of limitation. The chart below illustrates what may be considered current practice in Brazil with respect to the survival time of warranties:

Type of Claims	Typical Survival Periods
General	2 to 5 years
Tax related	5 to 6 years (rarely less)
Environmental related	2 to 10 years
Labor related	1 to 2 years
Social Security related	Often aligned with general, but sometimes more
Fraud	Typically not subject to any time limitation

V. Baskets/Deductibles and Caps

In case of a breach of a warranty, there are typically various limitations as to the amount to be claimed. A claim must typically exceed a *de minimis* level. Either the amount of the claim in excess thereof entitles to compensation (a "deductible") or the full amount may be claimed as long as the aggregate claim is above the *de minimis* level (a "basket"). It is also common to have a cap on the aggregate amount of compensation to be claimed; it may be the full purchase price but (perhaps more commonly) a much smaller amount.

A deductible (or basket) prevents the buyer from making a nuisance claim for non-material amounts. As well, provision for a deductible or basket reduces (but does not entirely eliminate) the need for copious materiality and knowledge qualifiers in the seller's representations/warranties. Even if the representation/warranty proves to be inaccurate, it will only matter if the claim reaches the specified level. Stated otherwise, the deductible or basket serves as an aggregate materiality threshold.

In the ABA Deal Points studies, the following data relating to caps, deductibles and baskets may be found:

	U.S. Study	European Study	Canadian Study
Deductible	59%	13%	14%
Basket	31%	72%	59%
Combination	5%	5%	7%
No basket or deductible	5%	10%	20%
Basket amount–as median of value	0.65%	0.7%	0.36%
Cap amount–as median of value	10%	20%	25%

Again, the ABA Deal Points studies demonstrate that indemnification deductibles, baskets and caps and the related carve-outs vary widely and are heavily negotiated in M&A transactions.

A. United States

Most private deals in the United States in which indemnification is a remedy include the concepts of baskets (or deductibles) and caps. The U.S. Study found that of the agreements surveyed, 59% included a pure deductible (*i.e.*, the seller is not

required to indemnify the buyer for losses until the aggregation of losses meet a specified dollar threshold, in which case the seller is only responsible for losses in excess of that threshold) and 31% included a "first dollar" or "tipping basket" deductible (*i.e.,* the seller is not required to indemnify the buyer for losses until the losses meet a specified dollar threshold, in which case the seller is responsible for all such losses). Of the remaining 10%, 5% of the agreements included no deductible at all, and 5% included a combination between a pure deductible and a "first dollar" deductible (*i.e.*, the seller is not required to indemnify the buyer for losses until the aggregation of losses meets a specified dollar threshold, in which case the seller is only responsible for losses in excess of a different, slightly lower threshold).

Baskets also vary in size. Of the deals that included baskets, 47% and 41% of the deals analysed in the U.S. Study had baskets that were between 0.5% and 1% of the transaction value and less than 0.5%, respectively. Twelve per cent of the deals included a basket that was between 1% and 2% of the transaction value.

Some deals (approximately half of the deals surveyed in the U.S. Study) include what is known as a "materiality scrape." Under this approach, generally materiality or "material adverse effect" qualifiers contained in the representations are disregarded for all indemnification-related purposes. Transactions that include baskets typically do not include a materiality scrape because small or insignificant claims are not indemnifiable until the basket is satisfied.

In terms of caps on a party's aggregate indemnification liability, 79% of the deals surveyed in the U.S. Study included caps that were less than the purchase price, 7% of the deals were silent, 7% included a cap that was not determinable, and 7% included a cap that was equal to the purchase price. Of the deals with determinable caps, 43% had a cap that was less than 10% of the purchase price. Fourteen per cent and 17% of the deals included a cap that was 10% of the purchase price and between 10 and 15%, respectively. Fourteen per cent of the deals had a cap that was between 15 and 25% of the purchase price, 4% of the deals had a cap that was between 25 and 50% of the purchase price, and 9% included a cap that was equal to the purchase price.

In addition, parties may negotiate to have certain specified items fall outside of the basket such that they are indemnifiable from dollar one and may negotiate for higher caps for these specific items.

B. Canada

In Canada, it is market to include either a deductible or basket (as described in the background above). It is also market to include a cap on aggregate damages (with some carve-outs). Nevertheless, while the basic ground rules are seldom in dispute, the devil is always in the details.

The Canadian Study shows that tipping baskets accounted for 59% of all agreements and true deductibles accounted for 14%. Thus, Canadian deals see both deductibles and baskets, but baskets are significantly more prevalent than deductibles. Of the remainder, 20% provided for no basket/deductible and 7% used a combination of thresholds and deductibles. Recall that 44% of the Canadian Study consisted of asset transactions.

Of the deductible provisions, deductibles ranged from a low of 0.9% of transaction value to a high of 1.38% of transaction value, a narrow range. The median deductible was 1.09% of transaction value—which was more than double from the 2008 Canadian Study.

Of the first dollar or tipping basket provisions, they ranged from a low of 0.01% to a high of 1.21%. The median was 0.36% of transaction value—approximately the same as in the 2008 Canadian Study. All else being equal, a tipping basket is more favourable to the buyer than a deductible. Accordingly, if a tipping basket is used, the seller arguably should expect a marginally higher proportion of transaction value than if a deductible is used. Nevertheless, at face value, the Canadian Study suggests the opposite: that the proportion of transaction value is significantly lower with tipping baskets than with deductibles. The likely explanation is that sellers who are in strong negotiating position can demand both deductibles and higher proportions to transaction value. Eager buyers may be prepared to be softer on both counts.

Again, the Canadian Study shows various carve-outs from the general indemnity basket regimes. None of these carve-outs reached 40% of all purchase agreements. A fraud exception was highest at 37% (but would probably be implicit in the remaining 73%). Other exceptions include intentional breach (23%), due authorization (20%), taxes (18%), due organization (16%), ownership of shares (21% after adjustment) and capitalization (25% after adjustment). Despite these low figures, a case can be made for each of these carve-outs. They may simply not have been warranted in the transactions included in the survey.

Caps were found in 72% of the agreements. The remaining agreements were silent. Of the determinable caps, 26% were equal to the purchase price and 74% were for less than the purchase price. Specifically, about 14% were between 50% and the purchase price; 25% were for <10% of the purchase price and another 18% were for between 25% and 50% of the purchase price. The median cap (including caps at the purchase price) was 25% of transaction value (much higher than the 10% median in the U.S. Study). Again, caps may be subject to various carve-outs. As in the case of carve-outs from the general indemnity basket, the most common carve-out was for fraud (35% expressly). Notably, Canadian deals provide for a cap equal to the purchase price much more frequently than in U.S. transactions (Canada 40%; U.S. 9%). In general, Canadian transactions have significantly higher caps than U.S. transactions, which probably reflects the smaller average transaction values in the Canadian Survey and the diminished presence and influence of private equity sellers in Canada as compared with their influence in the U.S. market.

C. Portugal

In Portugal, it is quite common to have a cap on the aggregate amount of compensation to be claimed in transactions of a certain size. Such cap may be the purchase price or a smaller amount which the parties agree to—reaching such an agreement is not always easy and sometimes leads to protracted negotiations between the parties.

D. Sweden

In any deal of any significance, one would expect to have a *de minimis* level which must be reached before claims are indemnified. Such level would most often be expressed as a basket where the full amount of the claims is indemnified once a certain *de minimis* level is reached. In the European Study, a basket was found to be used in more than 72% of the purchase agreements but a deductible only in 13%. It is notable how much more common a basket is found to be in Europe compared to the U.S., where the U.S. Study found a deductible to be used in 59% of the purchase agreements surveyed.

In the past, it was not unusual to see an uncapped indemnity for claims under the warranties. However, for several years now, indemnification in a transaction involving a going concern most commonly would be capped at below 50% of the purchase price. Indeed, it is probably fair to say that about 25% of the purchase price is a typical cap. This is also consistent with the result of the European Study where the median cap was 20%.

E. India

In most significant deals, *de minimis* limits and baskets are common. Thus, there would be a *de minimis* limit, and a claim below that limit would not be treated as a valid claim at all. For claims that meet the *de minimis* limit, they would have to be accumulated together in a basket, and once the value of the claims so accumulated reaches a specified limit, then the purchaser may bring a claim against the seller. In many cases, this process would be dictated by the sophistication of the parties and the advisors involved.

Indemnities today are mostly capped. This would normally vary from 5% to 60% of the purchase price. There have been a few deals where the cap has been 100% of the purchase consideration—but this would be quite difficult to negotiate today.

F. Brazil

A considerable number of M&A purchase agreements in Brazil include baskets, deductibles and caps. Among those agreements which include basket concepts, it is fair to say that more agreements include "tipping basket" deductions rather than pure deductibles, and a few of them include a mix of a pure deductible and a tipping basket. Baskets vary considerably depending on the results of due diligence, acquisition price, etc.

In Brazil, it is also common to include caps on a party's aggregate indemnification liability, which usually vary between 100% of the purchase price and 30%. It is rare for agreements to have caps that are less than 30% to 50% of the purchase price. However, when it comes to claims related to fraud or gross misrepresentation, indemnification caps generally are not applicable and the seller has full liability.

VI. Escrow, Holdbacks, Bank Guarantees and Warranty Insurance

There are various ways to facilitate and secure collection of compensation for any claims raised under representations and warranties. There are the traditional and more customary means such as holding funds in escrow. As well, representation and warranty insurance provided by an insurance carrier has become more common in certain jurisdictions as a substitute or complement to the seller's warranties.

Relevant data in the ABA Deal Points studies may be summarized as follows:

	U.S. Study	European Study	Canadian Study
No Security	NA	34%	NA
No escrow/holdback	14%	NA	48%
Escrow/Holdback	85%	37% (escrow)	52%
Bank guarantee	NA	6%	NA
Other security	NA	23%	NA

A. United States

Eighty-five per cent of the deals surveyed in the 2011 U.S. Study that included a survival provision also included an escrow or holdback provision. Of that 85%, 57% provided that the escrow/holdback was not an exclusive remedy while 24% provided that the escrow/holdback was the exclusive remedy. The remaining 4% provided that the escrow/holdback and earn-out setoff are the exclusive remedies. The average escrow/holdback as found by the 2011 U.S. Study was 9.3% of transaction value, with over 75% of all agreements that contained an escrow/holdback provision calling for a holdback/escrow of an amount between 5% and 15% of the transaction value.

In the United States, an escrow/holdback provision is a negotiation point between the parties and is often requested by a buyer who harbours fears about the seller's creditworthiness or ability or willingness to satisfy its indemnification obligations after closing. Variation is found among escrow/holdback provisions with respect to how and when the escrow/holdback amount is released to the seller. Depending on the circumstances and negotiation dynamic, the escrow/holdback amount is either incrementally released over time (often over a period of several years commensurate with the survival period for the representations and warranties), or is released all at once in a lump sum at the end of the escrow period.

While very uncommon, as an alternative, in deals involving non-U.S. companies, the seller will sometimes ask the buyer to issue a letter of credit to back up its indemnification obligations. For instance, in the failed 2005 deal between Unocal Corp. and CNOOC, Unocal asked CNOOC to provide a bank guarantee to back up its obligations under the agreement.

U.S. companies sometimes avail themselves of representation and warranty insurance, which in effect is an insurance policy that serves as a substitute for an indemnification provision where the parties are unable or unwilling to agree to such a provision. The insurance is most commonly utilized in deals in which a private equity firm is the seller and a public company is the buyer. The reason for this trend is that private equity firms typically must distribute the proceeds of a sale to investors in short order (or are pressured to do so) and do not want to be burdened by a holdback, escrow or partial refund of part of the purchase price—and public company buyers (who often require indemnification for at least significant claims, for obvious economic reasons but also public relations considerations) can utilize representation and warranty insurance as a way to navigate negotiating roadblocks with private equity firms that as a matter of policy will not agree to provide indemnity.

An example of this dynamic playing out in practice was private equity firm Apax Partners L.P.'s 2010 sale of Tommy Hilfiger B.V. to Phillips-Van Heusen Corporation, a U.S. public company. Representation and warranty insurance, however, is not a perfect substitute for customary indemnification provisions. This is so because the insurance must be negotiated with an insurance company, often does not cover all possible claims for breaches of representations and warranties, and can be fairly cost inefficient. Parties also must discuss who should bear the cost for such insurance.

B. Canada

The Canadian Study shows that holdbacks or escrows were present in 52% of purchase agreements, which is exactly double the proportion in the 2010 Canadian Study results at 26%. Whether a holdback or escrow (which the Canadian Study uses as the same) is appropriate in one transaction is driven by factors that have nothing to do with what is done in other transactions.

Escrows and holdbacks as a proportion of transaction value ranged from a low of 3% (in 12% of agreements) to a high of 25% to 50% (in 12% of agreements). The most common proportion to transaction value was 5% to 10% (47% of agreements) and 10% to 25% (23% of agreements). The minimum proportion was 1.5% of transaction value and the maximum was 50%. The median figure was 10% of transaction value. Again, these figures have little to say about the appropriate proportion to transaction value in a given transaction.

If an escrow is used, it is important not to mix the escrow that may be used for the purchase price adjustment in respect of closing date working capital with an escrow needed to cover the seller's representations and warranties. Separate escrow amounts, using the same escrow agent and escrow agreement, should be used. Otherwise, a downward purchase price adjustment will erode the buyer's security for the seller's representations/warranties.

Standby letters of credit ("L/Cs") are seen more often in Canadian M&A practice than independent bank guarantees. This is likely a spillover from the prevailing practice south of the border—where U.S. banks are generally prohibited from providing guarantees in favour of third parties. That said, there is little to choose between a standby L/C and an independent bank guarantee.

A standby L/C is an extremely flexible tool that can perform a wide array of useful functions in an M&A transaction. For example, a seller may have its bank issue an L/C to the buyer as collateral security for the seller's representations/warranties—as a partial substitute for a prolonged escrow. The L/C may provide that the buyer can only draw down on the L/C by delivering a certified copy of one or more arbitral awards in its favour before expiry date of the L/C. Introducing an L/C may be used to resolve difficult impasses in negotiations. In another case, an L/C was issued to cover-off the seller's 50% portion of post-closing soil remediation expenses that the buyer would incur.

Buyers have also used standby L/Cs as security for the deposit under their purchase agreements (partly because it is less expensive than setting aside funds). A standby L/C may be issued as security for the seller's take-back ("VTB") note. The L/C gives the seller the security of having a bank payment obligation (rather than a pledge of shares or a subordinate security interest on the assets, which may be less satisfactory). Posting an L/C spares the buyer from having to arrange some other, more complex, form of security. However, in such case, the buyer sacrifices the ability to set-off against the VTB note any indemnification claims it may have arising under the purchase agreement. The L/C is an autonomous obligation of the bank and is payable against delivery of the documents specified in the L/C irrespective of any other claims that the buyer may have against the seller. These are just some of the many potential uses of an L/C in an M&A transaction.

Insurance to cover the seller's representations and warranties was in fashion in Canada a few years ago. Perhaps due to the cost or complexity of putting such insurance in place, it seems to have receded in the current market. Occasionally, however, such insurance ideally fits the needs of the parties.

C. Portugal

Bank guarantees and letters of credit used to be more commonly used in Portugal in the past, whereas today escrow is a more popular means to facilitate and secure collection of compensation for any claims raised under the seller's representations and warranties. Representation and warranty insurance provided by an insurance carrier is also seen in certain transactions as a substitute or complement to seller's warranties—but again more when

Portuguese entities are one of the involved subsidiaries or branches of a group located outside of Portugal and the structure of the transaction is defined centrally by the group and not locally.

D. Sweden

Escrow remains the most popular manner to secure claims on the Swedish market. Certain banks offer effective services as escrow agents and such banks are therefore typically engaged as escrow agents. Bank guarantees are less common due to costs involved. Escrow arrangements are also considered more straightforward and practical.

In addition, the use of insurance to cover any representation and warranty claims has become increasingly popular. Among others, private equity funds have found that they can close a fund and terminate any contingent liabilities much sooner with an insurance arrangement. The seller may then remain liable only for an amount equal to a deductible under the insurance and for an initial period which may be more limited than the claims period under an insurance policy. The buyer would direct any claims under representations and warranties directly to the insurer. In the Scandinavian market, insurers have become very eager to make sure that a policy may be put in place with a minimal amount of additional work or delay.

E. India

Escrows and holdbacks were fairly common when India opened up in the early 90s. However, today these are extremely rare and very difficult to negotiate. This position has mostly been a function of the market. With India being a "hot market" for investments over the last decade or so, escrows and holdbacks have become rare. However, with the market not being as robust as it used to be, these could make a comeback. There are also some regulatory challenges as in principle Indian exchange control regulations prescribe that all of the consideration should be brought up-front. Any form of a "deferred consideration" would require a prior government approval.

F. Brazil

In Brazil, there are multiple accepted manners to provide the level of comfort expected by the parties in M&A transactions (escrow, holdback, bank guarantees and representation and warranty insurance are all seen in Brazilian deals). Nonetheless escrow accounts and holdbacks are undoubtedly the mechanisms most commonly seen. Representation and warranty insurance is not really used in Brazil.

VII. Conclusion

As this survey of buyer protection provisions in private M&A transactions demonstrates, there is much in common in the extent of buyer protection provision between the North America, Europe, India and Brazil. It is evident that buyers and sellers in all jurisdictions accept a wide range of provisions dealing with the allocation of closing risks, sandbagging, survival periods for representations and warranties, indemnification deductibles, baskets and caps, escrows and holdbacks—tailored to fit the bargaining strengths of the parties and the needs of the transactions. Doubtless, the wide range of what is found to be acceptable for these second-tier issues reflects the emphasis that the parties place on the primary issues: valuation of the business; price; and overall closing risks.

Endnotes

1. The 2011 U.S. Private Target M&A Deal Points Study is the most recent of the U.S. M&A market conducted by the American Bar Association (the "U.S. Study"). The U.S. Study covered transactions completed in 2008 and including private targets being acquired by U.S. public companies in transactions material enough to be covered to those companies to be required to be filed on the U.S. Securities and Exchange Commission's Electronic Data Gathering Analysis and Retrieval system ("EDGAR"). Deals having a transaction size of less than US$25 million or more than US$500 million were excluded as were transactions deemed inappropriate for inclusion such as targets in bankruptcy and reverse mergers. The U.S. Study covered 106 deals and 83% of those were share deals and 17% asset deals. Source: Business Law International Vol. 12 No. 2 by the International Bar Association Legal Practice Division.
2. The 2010 European Private Target M&A Deal Points Study is the most recent of the European M&A market conducted by the American Bar Association (the "European Study"). In Europe, there is no publicly available depository for acquisition agreements. Therefore, lawyers from various law firms throughout Europe identified share purchase agreements of relevance for the European Study and data was provided in response to questionnaires. The European Study covered 97 deals closed in 2008 with a value above €25 million.
3. The 2012 Canadian Private Target M&A Deal Points Study is the most recent survey of the Canadian M&A market conducted by the American Bar Association (the "Canadian Study"). The Canadian Study analyzes publicly available acquisition agreements for transactions completed in 2010 and 2011 that involved Canadian private targets being acquired by Canadian reporting issuers. Canadian reporting issuers must file versions of the acquisition agreements on the System for Electronic Document and Analysis ("SEDAR") maintained by Canadian securities regulatory authorities for reporting issuers. The Canadian Study consists of 64 acquisition agreements. Excluded from the sample are transactions with a deal value under CDN$5 million, transactions where the target was in insolvency proceedings, transactions involving related parties, transactions not governed by the law of a Canadian jurisdiction, and transactions deemed inappropriate for inclusion for other reasons. The deal size ranged from a low of CDN$5 million to a high of CDN$2.25B. Note that the sample included both asset and share transactions, with share transactions constituting approximately 53% of the total and asset transactions 44%.

This article was prepared for a session on "Private Mergers and Acquisitions—Trends in Buyer's Protection," sponsored by the International Section of the New York State Bar Association, held on 11 October 2012 in Lisbon, Portugal, and was updated to include the 2012 Canadian Private Target M&A Deal Points Study. The panel consisted of Ms. Ana Sofia Batista (Abreu Advogados, Lisbon, Portugal) and Messrs. Carl-Olof Bouveng (Advokatfirman Lindahl KB, Stockholm, Sweden), Wayne D. Gray (McMillan LLP, Toronto, Canada), Abhijit Joshi (AZB & Partners, Mumbai, India), Gregory E. Ostling (Wachtell, Lipton, Rosen & Katz LLP, New York, NY) and Ronaldo C. Veirano (Veirano Advogados, Rio de Janeiro and Sao Paulo, Brazil).

NEW YORK STATE BAR ASSOCIATION

INTERNATIONAL SECTION

Seasonal Meeting 2013

InterContinental Hanoi Westlake
October 23–26, 2013

Building Global Partnerships and Opportunities in the New Asia – Vietnam and the USA as a Model for Growth and Success

Come Join Us in Hanoi, Vietnam

For more information go to: www.nysba.org/ilpfallmtg2013

Sponsorship Opportunities
For further sponsorship information, please contact:
Diane O'Connell, Sponsorship Coordinator
diane.oconnell@us.pwc.com • (646) 471-7023

For general meeting information, please contact:
Glenn G. Fox, Esq., International Section, Chair-Elect
Baker & McKenzie LLP
glenn.fox@bakermckenzie.com

Eduardo Ramos-Gomez, Esq., Program Co-Chair
Duane Morris LLP
eramos-gomez@duanemorris.com

William H. Schrag, Esq., Program Co-Chair
Thompson Hine LLP
william.schrag@thompsonhine.com

For speaking opportunities, please contact:
William H. Schrag, Esq.
Thompson Hine LLP
william.schrag@thompsonhine.com

New York Steering Committee

Glenn G. Fox, Esq.
Baker & McKenzie LLP

Michael W. Galligan, Esq.
Phillips Nizer LLP

Diane O'Connell
PricewaterhouseCoopers LLP

Andrew D. Otis, Esq.
Curtis, Mallet-Prevost, Colt & Mosle LLP

Thomas N. Pieper, Esq.
Chadbourne & Parke LLP

Neil A. Quartaro, Esq.
Watson Farley & Williams LLP

William H. Schrag, Esq.
Thompson Hine LLP

Nancy M. Thevenin, Esq.
Baker & McKenzie LLP

Regional Steering Committee

Denny Cowger, Esq.
Duane Morris Vietnam LLC

Eduardo Ramos-Gomez, Esq.
Duane Morris LLP

Narun Popattanachai, Esq.
Columbia University

International Section Officers

CHAIR
Glenn G. Fox
Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
Glenn.Fox@bakermckenzie.com

CHAIR-ELECT
Thomas N. Pieper
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
thomas.pieper@hoganlovells.com

EXECUTIVE VICE-CHAIR/CIO
Neil A. Quartaro
Watson Farley & Williams LLP
1133 Avenue of the Americas, 11th Fl.
New York, NY 10036-6723
nquartaro@wfw.com

FIRST VICE-CHAIR
Nancy M. Thevenin
Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
nancy.thevenin@bakermckenzie.com

SECRETARY
Diane E. O'Connell
PricewaterhouseCoopers LLP
300 Madison Avenue, 11-233
New York, NY 10017
diane.oconnell@us.pwc.com

TREASURER
Lawrence E. Shoenthal
Weiser Mazars LLP
6 Dorothy Drive
Spring Valley, NY 10977
lbirder@aol.com

VICE-CHAIR/ LIAISON W/AMERICAN SOCIETY OF INTERNATIONAL LAW
Christopher Joseph Borgen
St. John's University School of Law
8000 Utopia Parkway
Belson Hall, Room 4-24
Jamaica, NY 11439
borgenc@stjohns.edu

VICE-CHAIRS/CLE
Daniel J. Rothstein
Law Offices of Daniel J. Rothstein
747 Third Avenue, 32nd Fl.
New York, NY 10017
djr@danielrothstein.com

Christopher J. Kula
Phillips Nizer LLP
666 Fifth Avenue, 28th Fl.
New York, NY 10103-0084
ckula@phillipsnizer.com

Matthew R. Kalinowski
Morgan, Lewis & Bockius LLP
101 Park Avenue, 44th Fl.
New York, NY 10178-0002
mkalinowski@morganlewis.com

VICE-CHAIR/COMMITTEES
Neil A. Quartaro
Watson Farley & Williams LLP
1133 Avenue of the Americas, 11th Fl.
New York, NY 10036-6723
nquartaro@wfw.com

Michael J. Pisani
167 Rockaway Avenue
Garden City, NY 11530
mjpisani@optonline.net

VICE-CHAIR/DIVERSITY
Kenneth G. Standard
Epstein Becker & Green, P.C.
250 Park Avenue
New York, NY 10177
kstandard@ebglaw.com

VICE-CHAIR/DOMESTIC CHAPTERS
Benjamin R. Dwyer
Nixon Peabody, LLP
40 Fountain Plaza, Ste. 500
Buffalo, NY 14202-2229
bdwyer@nixonpeabody.com

VICE-CHAIR/LAW STUDENT OUTREACH
Howard A. Fischer
Securities & Exchange Commission
3 World Financial Center
New York, NY 10281
FischerH@Sec.gov

VICE-CHAIR/LAWYER INTERNSHIPS
William H. Schrag
Thompson Hine LLP
335 Madison Ave.
New York, NY 10017
william.schrag@thompsonhine.com

VICE-CHAIR/LIAISON U.S. STATE BAR INTERNATIONAL SECTIONS
Michael W. Galligan
Phillips Nizer LLP
666 Fifth Avenue, 28th Fl.
New York, NY 10103-5152
mgalligan@phillipsnizer.com

VICE-CHAIR/LIAISON W/ INTERNATIONAL LAW SOCIETY
Nancy M. Thevenin
Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
nancy.thevenin@bakermckenzie.com

VICE-CHAIR/LIAISON W/AMERICAN BAR ASSOCIATION
Mark H. Alcott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas, 28th Fl.
New York, NY 10019-6064
malcott@paulweiss.com

VICE-CHAIR/LIAISON W/NEW YORK CITY BAR ASSN
Paul M. Frank
Hodgson Russ LLP
1540 Broadway, 24th Fl.
New York, NY 10036
pmfrank@hodgsonruss.com

VICE-CHAIR/MEMBERSHIP
Allen E. Kaye
Office of Allen E. Kaye, PC
111 Broadway, Ste. 1304
New York, NY 10006
akaye@kayevisalaw.com

Eberhard H. Rohm
Duane Morris LLP
750 B. St., Ste. 2900
San Diego, CA 92101
ehrohm@duanemorris.com

Daniel J. Rothstein
Law Offices of Daniel J. Rothstein
747 Third Avenue, 32nd Fl.
New York, NY 10017
djr@danielrothstein.com

Joyce M. Hansen
Federal Reserve Bank of New York
33 Liberty Street
Legal Group, 7th Fl.
New York, NY 10045
joyce.hansen@ny.frb.org

Jia Fei
Herbert Smith LLP
28F Office Tower, Beijing Yintai Centre
2 Jianguomenwai Ave.
Chaoyang District
Beijing 100-022
PEOPLES REPUBLIC OF CHINA
jessica.fei@herbertsmith.com

VICE-CHAIR/SPECIAL PROJECTS
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Ste. 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

VICE-CHAIR/SPONSORSHIP
Diane E. O'Connell
PricewaterhouseCoopers LLP
300 Madison Avenue, 11-233
New York, NY 10017
diane.oconnell@us.pwc.com

DELEGATES TO HOUSE OF DELEGATES
Andre R. Jaglom
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue, 12th Fl.
New York, NY 10022-4728
jaglom@thsh.com

Andrew D. Otis
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178-0061
aotis@curtis.com

Michael W. Galligan
Phillips Nizer LLP
666 Fifth Avenue, 28th Fl.
New York, NY 10103-5152
mgalligan@phillipsnizer.com

International Section Committees and Chairs

To view full contact information for the Committee Chairs listed below please visit our website at http://www.nysba.org/Intl/CommChairs

AFRICA
Janiece Brown Spitzmueller
George Bundy Smith

ASIA AND THE PACIFIC REGION
Ta-Kuang Chang
Lawrence A. Darby III

AWARDS
Michael M. Maney
Lester Nelson
Lauren D. Rachlin

CENTRAL & EASTERN EUROPE
Daniel J. Rothstein
Serhiy Hoshovsky

CHAIR'S ADVISORY COMMITTEE
Carl-Olof E. Bouveng
Michael W. Galligan

CONTRACT AND COMMERCIAL LAW
Albert L. A. Bloomsbury
Leonard N. Budow

CORPORATE COUNSEL
Barbara M. Levi
Allison B. Tomlinson

CROSS BORDER M&A & JOINT VENTURES
Gregory E. Ostling

INTERNATIONAL DISTRIBUTION, SALES & MARKETING
Andre R. Jaglom

INTERNATIONAL CREDITORS RIGHTS
David R. Franklin

INTERNATIONAL REAL ESTATE TRANSACTIONS
Meryl P. Sherwood

FOREIGN LAWYERS
Timo P. Karttunen
Maria Tufvesson Shuck

IMMIGRATION AND NATIONALITY
Jan H. Brown
Matthew Stuart Dunn

INDIA
Sanjay Chaubey
Jennifer R. Scullion

INSURANCE/ REINSURANCE
Edward K. Lenci
Chiahua Pan
Stuart S. Carruthers

INTERNATIONAL BANKING SECURITIES & FINANCIAL TRANSACTIONS
Joyce M. Hansen
Eberhard H. Rohm

INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION
L. Donald Prutzman
Eric Jon Stenshoel

INTERNATIONAL MICROFINANCE AND FINANCIAL INCLUSION
Julee Lynn Milham
Azish Eskandar Filabi

INTER-AMERICAN
Carlos E. Alfaro

INTERNATIONAL ANTITRUST & COMPETITION LAW
Olivier N. Antoine

INTERNATIONAL ARBITRATION & ADR
Chryssa V. B. Valletta
Dina R. Jansenson
Nancy M. Thevenin

INTERNATIONAL CORPORATE COMPLIANCE
Rick F. Morris
Carole L. Basri

INTERNATIONAL CRIMINAL LAW
Xavier Robert Donaldson

INTERNATIONAL EMPLOYMENT LAW
Aaron J. Schindel

INTERNATIONAL ENVIRONMENTAL LAW
Mark F. Rosenberg
John Hanna Jr.
Andrew D. Otis

INTERNATIONAL ESTATE AND TRUST LAW
Glenn G. Fox
Michael W. Galligan

INTERNATIONAL FAMILY LAW
Rita Wasserstein Warner
Jeremy D. Morley

INTERNATIONAL HUMAN RIGHTS
Santiago Corcuera-Cabezut

INTERNATIONAL INSOLVENCIES & REORGANIZATIONS
Tom H. Braegelmann
Garry M. Graber

INTERNATIONAL INVESTMENT
Lawrence E. Shoenthal
Christopher J. Kula

INTERNATIONAL LAW PRACTICE MANAGEMENT
James P. Duffy III

INTERNATIONAL LITIGATION
Jay G. Safer
Jennifer R. Scullion
Thomas N. Pieper

INTERNATIONAL PRIVACY LAW
Lisa J. Sotto

INTERNATIONAL TAX
James R. Shorter Jr.

INTERNATIONAL TRADE
Dunniela Kaufman
Robert J. Leo

INTERNATIONAL TRANSPORTATION
William Hull Hagendorn
Neil A. Quartaro

LATIN AMERICAN COUNCIL
Ruby Maria Asturias Castillo
Rodrigo Sola Torino

PUBLIC INTERNATIONAL LAW
Christopher Joseph Borgen
Mark A. Meyer

PUBLICATIONS
Lester Nelson
Dunniela Kaufman
Richard A. Scott
Amber Wessels

SEASONAL MEETING
Alvaro J. Aguilar
Juan Francisco Pardini

UN AND OTHER INTERNATIONAL ORGANIZATIONS
Jeffrey C. Chancas
Nina LaKarin
Edward C. Mattes Jr.

WOMEN'S INTEREST NETWORKING GROUP
Meryl P. Sherwood
Diane E. O'Connell

WOMEN'S INTERNATIONAL RIGHTS
Shannon Patricia McNulty

International Section Chapter Chairs

To view full contact information for the Chapter Chairs listed below please visit our website at http://www.nysba.org/Intl/ChapterChairs

CO-CHAIRS
Eduardo Ramos-Gomez
Gerald J. Ferguson
Jonathan P. Armstrong

ALGERIA
Abd El Karim Khoukhi

ARGENTINA
Juan Martin Arocena

AUSTRALIA
David Russell
Richard Arthur Gelski

AUSTRIA
Christian Hammerl
Otto Waechter

BAHRAIN
Ayman Tawfeeq Almoayed

BRAZIL
Isabel C. Franco

BRITISH COLUMBIA
Donald R.M. Bell

CARIBBEAN
Derek Jones

CHINA
Jia Fei

COLOMBIA
Ernesto Cavelier
Carlos Fradique-Mendez

CZECH REPUBLIC
Andrea Carska-Sheppard
Jiri Hornik

COSTA RICA
Hernan Pacheco

CYPRUS
Christodoulos G. Pelaghias

DOMINICAN REPUBLIC
Jamie M. Senior

DUBAI
Peter F. Stewart

ECUADOR
Evelyn L. Sanchez

EL SALVADOR
Zygmunt Brett

FLORIDA
Thomas O. Verhoeven
Leslie N. Reizes

FRANCE
Francois F. Berbinau

GERMANY
Axel Heck
Rudolf F. Coelle
Mark Devlin

GUATEMALA
Ruby Maria Asturias Castillo

GUJARAT
Kartikeya Kumar Tanna

HUNGARY
Andre H. Friedman

ICELAND
Asgeir A. Ragnarsson

INDIA
Sudhir Mishra

IRELAND
Eugene P. Carr-Fanning

ISRAEL
Ronald A. Lehmann

ITALY
Marco Amorese
Cesare Vento

JAPAN
Shirou Kuniya

KOREA
Hye Kyung Sohn

LUXEMBOURG
Ronnen Jonathan Gaito

MALAYSIA
Yeng Kit Leong

MAURITIUS
Stephen V. Scali

MEXICO
Santiago Corcuera-Cabezut
Juan Carlos Partida

MOSCOW
Maxim Barashev

NIGERIA
Lawrence Fubara Anga

PANAMA
Alvaro J. Aguilar
Juan Francisco Pardini

PARAGUAY
Nestor Loizaga Franco

PERU
Guillermo J. Ferrero

PHILLIPINES
Efren L. Cordero

POLAND
Szymon Gostynski

PORTUGAL
Pedro Pais De Almeida

QUEBEC
David R. Franklin

ROMANIA
Corin Trandafir

RUSSIA
Jennifer I. Foss

SAN DIEGO
Eberhard H. Rohm

SHANGHAI
Xiaohong Zhao

SINGAPORE
Urvaksh Dinyar Doctor
Eduardo Ramos-Gomez

SLOVAK
Roman Prekop
Miroslava Obdrzalkova

SPAIN
Clifford J. Hendel

SWEDEN
Carl-Olof E. Bouveng
Peter Utterstrom

SWITZERLAND
Patrick L. Krauskopf
Pablo M. Bentes
Nicolas Pierard
Martin E. Wiebecke

TAIWAN
Ya-hsin Hung

THAILAND
Ira Evan Blumenthal

TORONTO
Ari Tenenbaum

TURKEY
Mehmet Komurcu

UNITED KINGDOM
Jonathan P. Armstrong
Randal John Clifton Barker

URUGUAY
Andres Duran Hareau

VIETNAM
Suong Dao Dao Nguyen
Denny Cowger

U.S.-CANADA
Wayne D. Gray

WESTERN NY
Eileen Marie Martin

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

INTERNATIONAL LAW PRACTICUM

Editorial Board

The *Practicum* is a publication of the International Section of the New York State Bar Association. It is distributed free of charge to members of the Section.
The New York State Bar Association wishes to acknowledge the generous contribution of Mead Data Central, Inc. in donating access to the LEXIS®/ NEXIS® service for our use in the preparation of this publication.

ISSN 1041-3405 (print) ISSN 1933-8392 (online)